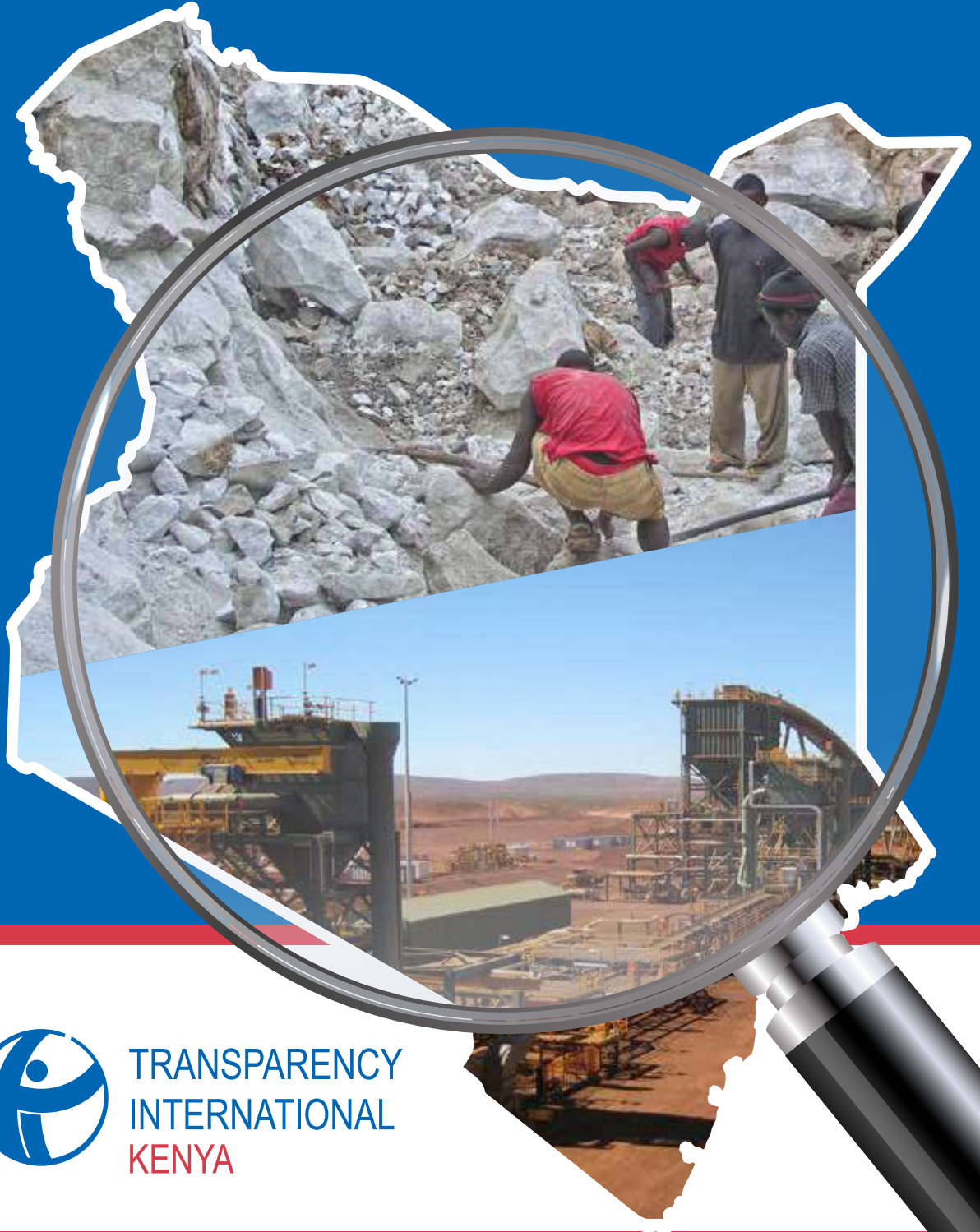


CORRUPTION RISK ASSESSMENT IN MINING AWARDS, 2017

A FOCUS ON KITUI, KWALE AND TAITA TAVETA COUNTIES
IN KENYA



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KENYA

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Author: **Transparency International Kenya**

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Acronyms

M4SD	Mining for Sustainable Development
CDA	Community Development Agreement
EIA	Environmental Impact Assessment
EMCA	Environmental Management and Coordination Act
EPL	Exclusive Prospecting License
FPIC	Free Prior Informed Consent
KCM	Kenya Chamber of Mines
MACRA	Mining Awards Corruption Risk Assessment
ML	Mining Lease
MRB	Mineral Rights Board
NLC	National Land Commission
NEMA	National Environmental Management Authority
OMC	Online Mining Cadastre

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The assessment would have not been possible without the financial support by our development partner. We thank the Australian Department of foreign Affairs and Trade in a special way for supporting this noble course.

Transparency International's Mining for Sustainable Development Programme

Transparency International Kenya is one of the 20 National Chapters participating in Transparency International's global Mining for Sustainable Development (M4SD) Programme. The Programme is coordinated by TI Australia. The M4SD Programme complements existing efforts to improve transparency and accountability in extractive industries by focussing specifically on the start of the mining decision chain: the point at which governments grant and award mining permits and licences, negotiate contracts and make agreements. Phase 1 of the Programme (2016-2017) is about understanding the problem by identifying and assessing the corruption risks in the process and practice of awarding mining permits, licences, and contracts. This report presents the main findings from the corruption risk assessment in Kenya.

With an understanding of the nature and causes of corruption risk, national chapters will develop and implement solutions to tackle priority corruption risks in Phase 2 (2018-2020). They will work with key stakeholders from government, the mining industry, civil society and affected communities to improve transparency, accountability and integrity in the decisions about approving mining projects.

The participation of Transparency International Kenya in Phase 1 of the Programme is supported by the Australian Department of Foreign Affairs and Trade. Globally, the M4SD Programme is also funded by the BHP Billiton Foundation.

Executive Summary

The Corruption Risk Assessment identified a total of Eighteen (18) risks which are likely to occur¹ in the award process. The risks broadly focused on gaps in the legal and policy framework, access to information, public participation processes, institutional capacity concerns among others.

Some of the risks include;

- Speculation around land that is subject to a mining permit application, such as by officials working with collaborators to change the status of the land to extract payments out of the license-holder
- Lack of verification of the accuracy or truthfulness of environmental impact assessment (EIA) reports by the relevant authorities
- Failure to report incidents of corruption in the awards process by those who have knowledge of such incidents
- Lack of legal protection for whistleblowers
- Lack of public knowledge on steps of an award process
- Lack of knowledge on the criteria for awarding licenses
- Lack of knowledge of the legal framework for consultations by communities or landholders in cases where this is a requirement
- External interference in the award agencies' awarding of licenses
- Manipulation of negotiations for landholder or community agreements where consultation with communities or landholders is required
- High likelihood of ignoring free, prior, informed consent of the affected communities as a result of corrupt practices where consultations are required
- Failure to carry out due diligence on applicants' integrity, such as past lawful conduct and compliance
- Lack of legal clarity on surface rights in areas being opened for mining
- Community leaders negotiating with a mining company will not adequately represent community members' interests
- Criteria for Environmental Impact Assessments are not publicly known

¹ The likelihood factors are on a scale of 1 to 5 where 1=Almost impossible, 2=Unlikely, 3=Possible, 4=Likely and 5= Almost certain

Recommendations

Ministry of Mining

1. Fast-track gazetement of all the necessary Mining Regulations and Guidelines such as the Mining (Royalty) Regulations to support effective implementation of the Mining Act 2016
2. Sensitize companies, affected communities and all the other relevant stakeholders on the use of the newly re-configured and upgraded cadastre system 2016 to improve their knowledge on the online licensing system and to achieve the objectives of the Mining Act, 2016
3. Simplify laid down procedures and steps involved in acquisition of mineral rights for better understanding of the processes especially by affected communities
4. Set up mechanisms that will promote public participation and information sharing between the ministry and all the relevant stakeholders in line with Constitutional provisions, Access to Information Act and all other relevant statutes and guidelines for greater transparency of the licencing process
5. Set up a comprehensive internal complaints handling mechanism to encourage reporting of anomalies that are experienced during the licencing process
6. Establish a whistle-blower mechanism to encourage most stakeholders with critical information to confidently submit complaints to the ministry for action
7. Develop guidelines for basic due diligence to ensure that due diligence is carried out during the evaluation of license applications with an aim of establishing clear background of all license applicants. This would assist in filtering out applicants with a questionable historical profile to determine further action before issuance of licences
8. Publish the already gazetted rules and regulations for ease of access by all stakeholders
9. Fast-track development of its communication strategy to aid improved communication within the sector

National Environmental Management Authority

1. Create awareness amongst the affected communities on the Environmental Impact
2. Assessment process to promote their meaningful participation in the process
3. Simplify procedures and steps involved in conducting environmental impact assessments for ease of understanding by the relevant stakeholders especially the affected communities
4. Proactively follow up on the EIA process to ensure accuracy of EIA reports and setting up of appropriate mitigation measures
5. Proactively publish the EIA reports to promote access to information on the impacts of the proposed projects
6. Develop more stringent guidelines to govern the conduct of EIA experts to curb production of manipulated EIA reports

7. Establish effective terms of engagement with the other lead agencies involved in the assessment of EIA findings to ensure quality of the assessments.
8. Advocate for improved budgetary allocation to support proper assessment and monitoring activities by the Authority

Mining Companies

1. Set up proper mechanisms that would promote incorporation of views from the affected communities in the EIA processes
2. Flag out any anomalies observed during the license application process by licensing officials or their peers to create a culture of transparency in the award process
3. Develop internal policies to promote transparency and engagement with communities based on best practices such as the Informed Free Prior Consent Standards
4. Adopt integrity management initiatives within the organization in line with legal frameworks available locally and at country of origin
5. Consider joining private sector initiatives that promote doing business with integrity such as the UN Global Compact initiative

Civil Society Organizations

1. Create awareness on the licencing processes amongst the affected communities as this will promote their participation at different stages
2. Monitor operations of the Minerals Rights Board to ensure its compliance with the laid down procedures in making recommendations for issuance of licences
3. Support the affected communities in seeking redress for violations that may arise as a result of lack of adherence to laid down procedures in awarding various licences
4. Develop a peer learning framework to keep up with the developments in the sector as this would ensure informed advocacy initiatives regarding granting of mineral rights
5. Develop sustainable monitoring mechanisms to ensure that companies and relevant government departments involved in the award processes remain compliant with the law
6. Lobby for transparency in award of license including concessions and tax deals made

Affected Communities

1. To proactively seek information on the different mineral licensing processes to effectively engage with mining companies and government departments
2. To ensure adequate representation at all forums where deliberations on mineral licensing are taking place
3. To proactively identify and report all corruption related incidents that may result into manipulation of the licensing processes

Chapter One

Introduction

The Corruption Risk Assessment was conducted as part of Transparency International's Mining for Sustainable Development Programme. The aim of this study is to identify the systemic, regulatory and institutional vulnerabilities to corruption in awarding mining and mining-related licences, permits and contracts and to assess the specific corruption risks created by these vulnerabilities. This report presents the main findings from the study and the results of the corruption risk assessment. In Kenya, the assessment focused on three (3) counties that carry out mining activities. These are: Kitui, Kwale and Taita Taveta counties. Further engagements were held at the national level focussing on key institutions that have a direct impact on the sector. It is worth noting that the extractives sector is an emerging area and the mentioned counties are all at different stages.

This assessment comes at an opportune time for the mining sector following the enactment of the Mining Act 2016² which repealed the Mining Act 1940. It has enhanced governing of the mining sector including reviewing of the award processes. Further, the Ministry of Mining has developed draft mining regulations and guidelines to support implementation of the Act. Additionally, the online cadastre system is undergoing reconfiguration to comply with the provisions of the Mining Act, 2016. These guidelines are yet to be gazetted to aid their operationalization. Despite the improved legal framework, this assessment will establish the existing gaps that might pose corruption risks within the mining awards processes and provide recommendations to address the gaps.

The report is structured as follows; Chapter one covers the introduction which gives an overview of TI-Kenya and the purpose for the assessment, Chapter two covers the methodology for the assessment while chapter three gives a detailed background regarding the mining sector in Kenya, how the mineral rights are allocated and the processes identified for this assessment. Chapter four gives a description and analysis of the licensing process, practice and context, chapter five provides information on the results and discussions on the results. Finally, Chapter six covers the recommendations and conclusions from the assessment.

² Mining Act 2016- <http://www.kenyalaw.org/lex//actview.xq?actid=No.%2012%20of%202016>

Chapter Two

Methodology

2.1. MACRA Tool

The analysis in this report uses the research method contained in the Mining Awards Corruption Risk Assessment (MACRA) Tool (Nest 2016). The MACRA Tool was created by an independent expert engaged by Transparency International to provide a consistent, clear and robust methodology for identifying and assessing corruption risks in the twenty countries participating in the M4SD Programme.

The first part of the risk assessment involves data collection and analysis. The MACRA Tool guides users to create a map of the awards process as set out in law, official guidelines and policy. It also directs users to collect information about the practices in implementing the process and about relevant contextual factors. Users then analyse these three aspects of mining awards—the process, practice and context—to identify vulnerabilities to corruption. Vulnerabilities are systemic, regulatory, institutional or other weaknesses that create risks of corruption that is they create opportunities for corrupt conduct to occur or to pass undetected and thereby undermine the lawful, compliant and ethical awarding of licences, permits and contracts. The second part of the tool instructs users to identify and assess the specific corruption risks created by these vulnerabilities. The tool contains a list of 89 common risks relating to five different risk factor categories – corruption risks originating in: 1. the process design, 2. process practice, 3. contextual factors, 4. accountability mechanisms, and 5. the legal and judicial responses to corruption.

Users can adopt or modify the common risks, or create a new risk that better fits their circumstances. They then assess each corruption risk by analysing evidence of the likelihood of its occurrence and potential impact. The final stage is risk prioritisation. The chapter's priority risks are those corruption risks the chapter will seek to mitigate or manage. The results of the risk assessment are the primary input into this determination, but other matters such as the national chapter's capacity to take action, the resources required and potential for stakeholder collaboration are also important considerations.

The MACRA Tool builds on Transparency International's experience with corruption risk assessment in other fields such as National Integrity Systems and other mining and extractive sector instruments, indices and resources. Experts from multilateral institutions, major international non-governmental organisations and industry bodies provided valuable feedback in the development of the MACRA Tool

The research followed prescribed steps to identify and qualify risks as guided by the MACRA Tool. These steps were designed to ease the identification of corruption risks in any country context.

Figure 1 below outlines the basic outline that was adopted.

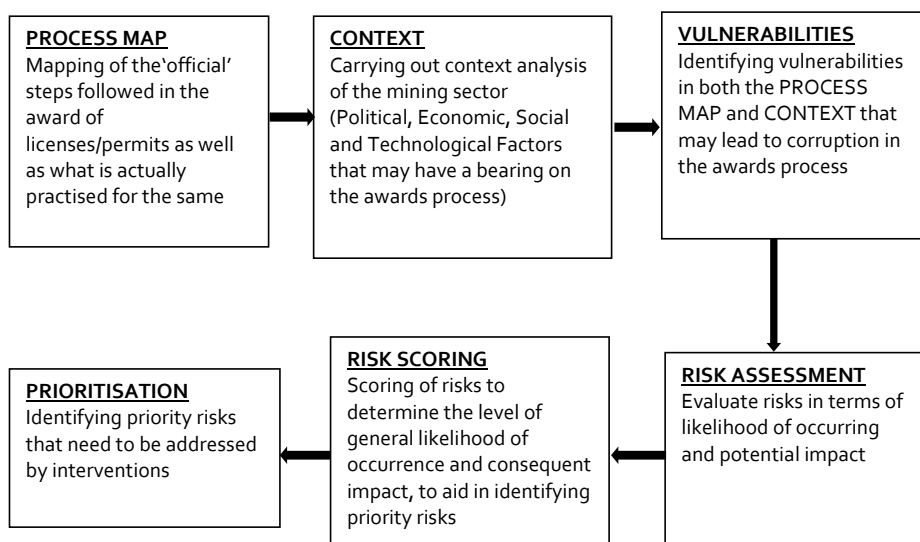


Figure 1: Study Methodology

The process began with a comprehensive desk review of existing literature and stakeholder mapping. TI-Kenya customised the MACRA Tool for Kenya's context and developed data collection tools (questionnaires) for information gathering. The questionnaires were structured to cater for closed and open ended questions. The assessment focused on three (3) counties that carry out mining activities. These are: Kitui, Kwale and Taita Taveta counties. Further engagements were held at the national level focusing on key institutions that have a direct impact on the sector. The data collection was conducted between January and May 2017. This was led by the national researcher and supported by 2 research assistants in each county and an officer from TI-Kenya. Data was collected through Focus Group Discussions (FGDs) and Key Informant Interviews targeting Civil Society Organizations working in the sector, affected communities, mining companies and government departments with crucial roles in decision making for the processes. TI-Kenya reached out to a total of 78 respondents (31 female and 47 male) in the three counties, through Focus Group Discussions as illustrated in the table below:

County	Male	Female	Total
Kitui	13	9	22
Kwale	16	14	30
TaitaTaveta	18	8	26

Table 1: Focus Group Discussion

The Key informant interviews targeted representatives from the following institutions;

- Adam Smith International
- Kenya Chamber of Mines
- National Environment Management Authority
- World Wildlife Fund Kenya
- Action Aid Kenya
- Kenya National Commission on Human Rights

- Kenya Land Alliance
- Institute for Law and Environmental Governance (ILEG)
- Tax Justice Network Africa
- Extractive Sector Observatory
- County Assemblies in Kitui, Kwale and Taita Taveta
- Kenya Forest Service
- Land registry and adjudication offices
- Base Titanium in Kwale
- Athi River Mines Company
- National Land Commission

The key informants interviewed are as indicated in the table below.

County	Male	Female	Government	Company	CSO	Total
Kitui	5	3	7	0	1	8
Kwale	5	2	6	1	0	7
TaitaTaveta	3	3	6	0	0	6
Nairobi	13	1	5	1	8	14

Table 2: Key Informants

Scoring of the risks was initially done by an advisory group comprising of key TI-Kenya staff, including the M4SD national Researcher. Subsequently, validation workshops were held in the three Counties and at the national level where key stakeholders reviewed the identified risks and offered their scores by giving clear justifications to the scores. Thereafter, the advisory group analysed the feedback from the validation workshops and rationalized the scores for the identified risks.

2.2. Limitations of the Assessment

Although the assessment yielded key findings, limitations were experienced as follows;

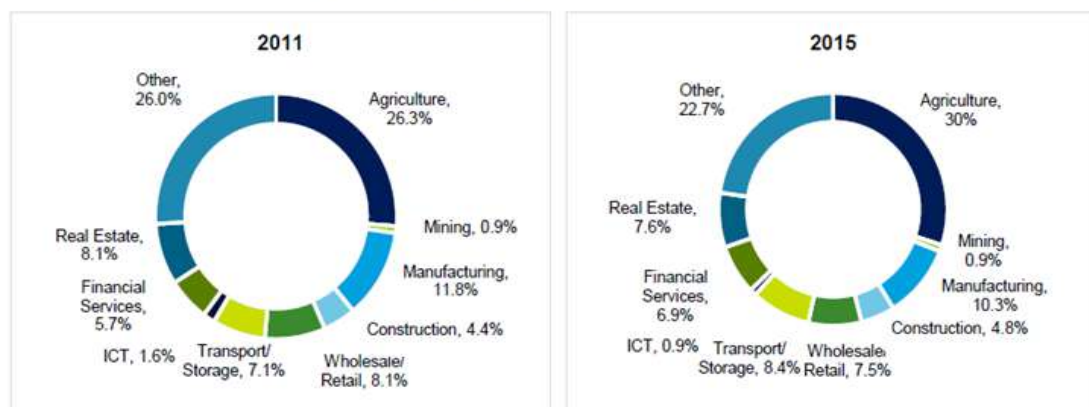
1. The ministry was undergoing legal and institutional reforms which led to development of new laws and regulations. As a result, some of the licensing processes were not clearly defined due to lack of regulations to facilitate implementation of the Acts.
2. Despite the enactment of the new Mining Act 2016, some processes were yet to be operationalized, for instance awarding of new licenses through the online licensing portal. This posed a limitation to this assessment as neither a solid comparison with the old regime has been derived nor conclusion on the effectiveness of the new licensing regime reached.

Chapter Three

Background Information on the Mining Sector and Governance Structures

Kenya focused on developing farming, tourism, manufacturing and service industries in the past years. “The mineral deposits were predominately titanium and non-metallic substances such as soda ash, kaolin, fluorspar and gemstones.”³ Until recent years, mining exports only amounted to around 1 per cent of the GDP however, it has the potential to contribute 4%- 10% of the country’s GDP⁴. This is a relatively low contribution as compared to other sectors such as agriculture and manufacturing as shown in figure 2 below

Sector contribution to GDP (%), 2011 & 2015



Source: KNBS, 2016

Figure 2: Sectors contribution to GDP (%)⁵

The minerals found in Kenya on the other hand can be classified as per table 4 below;

Industrial Minerals	Base Metals	Gemstones	Dimension Stones	Precious Metals	Construction Aggregates
Limestone	Iron ore	Ruby	Soapstone	Gold	Sand
Diatomite	Copper	Sapphire	Granite		Gravel
Soda Ash	Manganese	Tsavorite	Limestone		Crushed stone
Fluorspar	Titanium	Amethyst	Marble		Slag
Barite	Tungsten	Garnets	Travertine		
Gypsum		Tourmaline	Slate		
Silica		Pyrite	Alabaster		
Chromite			Tuff		
Vermiculite					
Granite					
Wollastonite					

Table 3: Classification of minerals found in Kenya⁶

³ Mining in Kenya – the start of a new era?, Mayer Brown, 2013 accessed from https://www.mayerbrown.com/files/uploads/Documents/PDFs/Mining_in_Kenya2.pdf

⁴ Kenya Mining Investment handbook, 2016 at pg. 16 accessed from <http://www.mining.go.ke/wp-content/uploads/2016/11/Kenya-Mining-Investment-Handbook-2016.pdf>

⁵ Kenya Grounding Africa’s Economic Growth October 2016, pg.12 at https://www2.deloitte.com/content/dam/Deloitte/za/Documents/africa/za_Kenya_Report_Formatted.pdf accessed on 29th June 2017.

⁶ Kenya Mining Investment handbook 2016. <http://www.mining.go.ke/wp-content/uploads/2016/11/Kenya-Mining-Investment-Handbook-2016> accessed on 22-03-2017

3.1. Key Actors in the Mining Sector

The Mining sector brings together a number of key players whose contributions vary depending on their mandate. The players include: Government Ministries, Departments and Agencies, Legislature, Mining Companies, Civil Society Organizations, Academia and Affected Communities among others. Their roles vary based on their mandates and include;

- Governing of the Mining Sector
- Mining and minerals development
- Knowledge enhancement of Mining and Mineral Processing⁷ and acting as a repository⁸ for the Mining Sector in Kenya
- Monitoring compliance with legislations and policies that govern the Mining Sector
- Sensitization and capacity building of affected communities on mineral development and Mining processes.

3.2. Mining Sector Governance

The mining sector is governed by various legal, policies, regulatory and institutional frameworks. It is however notable that the country has enacted various laws that form part of the anti-corruption legal framework such the Anti - Corruption and Economic Crimes Act,2003, The Bribery Act,2016, Access to Information Act, 2016 among others. These laws have a great impact in the governance of the sector. This section will however focus on the laws that have a direct impact in the mining sector as discussed below.

3.2.1. Legal, Policy and Regulatory Frameworks

The Constitution of Kenya 2010

The Constitution of Kenya 2010 provides for a legal and institutional framework that directly impact on the mining sector. Article 60 (1) (c) provides for principles of land policy and emphasizes on sustainable and productive management of land resources, Article 62 (1) (f) defines public land by law to include among others all minerals and mineral oils while Article 69 (1) (a) stipulates that the state shall ensure sustainable exploitation, utilization, management and conservation of the environment and natural resources and ensure the equitable sharing of the accruing benefits. Further, it establishes the National Land Commission under Article 67 (1). These provisions play a critical role in the governance of the mining sector.

Mining Act, 2016

The Mining Act came into force in 2016. This Act give effect to Articles 60, 62 (1)(f), 66 (2), 69 and 71 of the Constitution in so far as they apply to minerals; provide for prospecting, mining, processing, refining, treatment, transport and any dealings in minerals and for related purposes. The Act categorizes mining operations as large-scale, small-scale and artisanal mining.⁹ It governs various aspects within the sector.

These include ownership of minerals, general principles that govern acquisition of mineral

⁷ Taita Taveta University School of Mines and Engineering at <http://www.ttu.ac.ke/course/> - accessed on 5th June 2017

⁸ Extractives Baraza's website at <http://extractives-baraza.com/> - accessed on 5th June 2017

⁹ S 2 of the Mining Act, 2016



rights, administration of the sector, mining institutions and bodies, categories of mineral rights, mineral agreements, surrender, suspension and revocation of mineral rights, surface rights compensation and disputes, dealings in minerals among others.

Mining and Minerals Policy, 2016

“The overall goal of the Mining and Mineral Resources Policy is to set out frameworks, principles, and strategies to provide for exploration and exploitation of mineral resources for the country’s socio-economic development.”¹⁰

The guiding principles of the Mining and Mineral Policy are¹¹:

- Ensuring inter-generational equity and sustainable utilization of mineral resources so that the country’s mineral wealth benefits current and future generations of Kenyans
- Integrating sound environmental protection, safety and health concerns in mineral resources development, to make sure that there is equitable access to mineral resources and benefit sharing at the national, county and community levels
- Ensuring transparency, accountability and public participation in line with the requirements of the constitution
- To promote international and regional cooperation in the management of mineral resources
- To respect socio-cultural values and ensure access to justice, gender equity and inclusiveness
- To promote value addition and development of horizontal and vertical linkages to the local economy (horizontal linkages are linkages between companies on the same level of the value chain while vertical linkages are relationships between companies along the value chain).

Draft Mining Regulations and Guidelines

To promote the implementation of the Mining Act 2016, the Ministry of Mining developed 14 draft mining regulations and guidelines. These regulations were developed through a consultative process which involved key stakeholders whose interventions focus on the extractive sector. These guidelines were in draft form awaiting gazetement as at the time of the assessment. They include¹²:

- Mining (Use of Assets) regulations, 2016
- Mining (Award of Mineral Rights by Tender) Regulations, 2016
- Mining (Community Development Agreement), Regulations, 2017
- Mining (dealings in Minerals) Regulations, 2017
- Mining (Employment and Training) Regulations, 2017
- Guidelines for Work programmes and exploration reports, 2017
- Mining (use of Local goods and services) Regulations, 2017
- Mine Support Services Regulations, 2016

¹⁰ Mining and Minerals Policy, 2016 the popular version, pg. 11 accessed from <https://www.idlo.int/sites/default/files/pdfs/highlights/Kenya%20Mining%20Policy%20Popular%20Version-LowRes.pdf>

¹¹ Mining and Minerals Policy, 2016 the popular version, pg. 11 accessed from <https://www.idlo.int/sites/default/files/pdfs/highlights/Kenya%20Mining%20Policy%20Popular%20Version-LowRes.pdf>

¹² Public notice and draft Mining regulations and guidelines from Ministry of Mining website-http://www.mining.go.ke/?page_id=28, Accessed on 5th June 2017.

- Mining (State Participation) Regulations, 2016
- Mining (National Mining Corporation) Regulations, 2017
- Mining (Reporting of Mining and Mineral Related Activities) Regulations, 2017
- Strategic Minerals Regulations, 2016
- Mining (Licensing and permitting) Regulations, 2016
- The Mining (Royalty) Regulations 2017.

It is however notable that that the above guidelines were gazetted in July 2017 except the Mining (Royalty) Regulations 2017.¹³

The Land Act, 2012

The Land Act, 2012 gives effect to Article 68 of the Constitution of Kenya 2010, to revise, consolidate and rationalize land laws in Kenya and to provide for the sustainable administration and management of land and land based resources and for connected purposes in Kenya. It seeks to address management and administration of public land which includes minerals and mineral oils. Further, it governs compulsory acquisition of interests in land and settlement programmes among others.

The Land Registration Act, 2012

This Act seeks to revise, consolidate and rationalize the registration of title to land, to give effect to the principles and object of devolved government in land registration and for connected purposes.

The National Land Commission Act, 2012

This Act gives effect to Article 67 of the Constitution of Kenya 2010 and establishes the National Land Commission. It also provides qualifications and procedures for appointments to the Commission; to give effect to the objects and principles of devolved government in land management and administration. The National Land Commission has a crucial role in the mining sector as it conducts research related to land and the use of natural resources, and makes recommendations to appropriate authorities; the chairman of the National Land Commission is a member of the Minerals Rights Board.

The Community Land Act, 2016

This Act gives effect to Article 63 (5) of the Constitution; to provide for the recognition, protection and registration of community land rights; management and administration of community land; to provide for the role of county governments in relation to unregistered community land and for connected purposes

Environmental Management and Coordination Act (Amended) 2015 (EMCA)

This law establishes the National Environment Council to be responsible for policy formulation. It also establishes a National Environmental Management Authority (NEMA) to exercise general supervision and coordination over all matters relating to the environment. It is buttressed by the Environmental (Impact Assessment and Audit) Regulations of 2003.

¹³ Information received from Ministry of Mining officials during a meeting held on 13-9-2017



The law lays down the procedure for conducting Environmental Impact Assessments (EIA) and states that all new projects that are likely to affect the environment in any way must undertake an EIA after which the EIA report should be submitted to NEMA for review and approval. The EIA reports are subsequently made public to all stakeholders.¹⁴ It is however notable that the EIA reports are not proactively disclosed to members of the public.

2.2.2. Institutional Framework

The institutional framework for the mining sector in Kenya is guided by the Mining Act, 2016 and other related statutes as described below;

Ministry of Mining

The ministry was formed in 2013 with the following mandate;¹⁵

- Mineral exploration and mining policy and management;
- Inventory and mapping of mineral resources;
- Mining and minerals development;
- Policies on the management of quarrying and mining of rocks and industrial minerals e.g. limestone, building stone, clay, gemstones, cement, sand, coal, etc.
- Management of health conditions and health and safety in mines;
- Policy around extractive industry;
- Resources survey and remote sensing; and
- Maintenance of geological data (research, collection, collation, analysis).

Mineral Rights Board (MRB)¹⁶

The Mineral Rights Board is established under S 30 of the Mining Act, 2016. The board has the mandate of advising and giving recommendations to the Cabinet Secretary on the following;¹⁷

- The grant, rejection, retention, renewal, suspension, revocation, variation, assignment, trading, tendering, or transfer of Mineral Rights Agreements;
- The areas suitable for small scale and artisanal mining;
- The areas where mining operations may be excluded and restricted;
- The declaration of certain minerals as strategic minerals;
- Cessation, suspension, or curtailment of production in respect of mining licenses;
- Fees, charges and royalties payable for a mineral right or mineral; and
- Any matters which under this Act, are required to be referred to the Mineral Rights Board.

¹⁴ https://www.nema.go.ke/index.php?option=com_content&view=article&id=119&Itemid=144

¹⁵ Executive Order No. 2/2013, Organization of the Republic of Kenya, 2013 at <http://www.shitemi.com/wp-content/uploads/2013/10/executive-order-no-2-of-2013-on-the-organization-of-gok.pdf> accessed on 27th June 2017

¹⁶ Mining Act 2016, Section 30

¹⁷ S 31(1) of the Mining Act, 2016

The National Land Commission (NLC)

The National Land Commission is established under Article 67(1) of the Constitution of Kenya 2010. The functions are to;¹⁸

- Manage public land on behalf of the national and county governments;
- Recommend a national land policy to the national government;
- Advise the national government on a comprehensive programme for the registration of title in land throughout Kenya;
- Conduct research related to land and the use of natural resources, and make recommendations to appropriate authorities;
- Initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress;
- Encourage the application of traditional dispute resolution mechanisms in land conflicts;
- Assess tax on land and premiums on immovable property in any area designated by law; and
- Monitor and have oversight responsibilities over land use planning throughout the country

Additionally, the Chairman of the National Land Commission is a member of the Minerals Rights Board.¹⁹

The National Environmental Management Authority (NEMA)

NEMA is established under S 7 of the Environmental Management and Coordination Act, 1999 with the mandate to perform the following duties:

- Co-ordinate the various environmental management activities being undertaken by the lead agencies and promote the integration of environmental considerations into development policies, plans, programmes and projects with a view to ensuring the proper management and rational utilization of environmental resources on a sustainable yield basis for the improvement of the quality of human life in Kenya.
- Take stock of the natural resources in Kenya and their utilisation and conservation.
- Audit and determine the net worth or value of the natural resources in Kenya and their utilization and conservation.
- Make recommendations to the relevant authorities with respect to land use planning.
- Examine land use patterns to determine their impact on the quality and quantity of natural resources.
- Identify projects and programmes or types of projects and programmes, plans and policies for which environmental audit or environmental monitoring must be conducted under this Act.

¹⁸ Article 67(2) of the Constitution of Kenya, 2010

¹⁹ S 30(2) (e) of the Mining Act, 2016. http://kenyalaw.org/lex/actview.xql?actid=No.%2012%20of%202016#part_V. Accessed on 19th June 2017.



- Monitor and assess activities, including activities being carried out by relevant lead agencies, in order to ensure that the environment is not degraded by such activities, environmental management objectives are adhered to and adequate early warning on impending environmental emergencies is given.

The EMCA further mandates NEMA to issue an Environmental Impact Assessment License to a proponent of a project after the successful completion and submission of an Environmental Impact Assessment study report.²⁰

Ministry of Environment and Natural Resources

Its mandate is to develop policy and provide direction in the sustainable use of natural resources, water, and environment to secure the livelihoods of Kenyan citizens. The environmental policies have the goal of minimizing the impacts of the mining activities.

Ministry of Lands, Housing and Urban Development

The Ministry is charged with the responsibility of ensuring efficient administration and sustainable management of the land resource in the country. Licensing processes require several certifications from the Ministry on documentation.

County Governments

County governments are established under Article 176 of the Constitution of Kenya, 2010²¹. The counties are charged with the development of counties and administration of activities at the local level. Notifications to County governments are required in licensing and their consent is required before any prospecting or mining activity begins.²²

The Kenya Revenue Authority

The Kenya Revenue Authority (KRA) has the mandate to assess and collect taxes on behalf of government. In as far as development of taxation policy and implementation of the policy, KRA remains a key stakeholder in understanding and interpreting taxation law as well as its application in a given industry.²³

Kenya Investment Authority

The Kenya Investment Authority is mandated under the Investment Promotion Act 2004²⁴ to promote and facilitate investment in the country. In addition to providing services for registered investors, it is an important stakeholder in understanding the incentives that exist for investors in various sectors including the extractive industries. Its policies and related laws have an impact on the investment environment in the extractives industry.²⁵

The National Treasury

The National Treasury has a mandate to formulate finance and economic policy among other critical functions related to its role as the custodian of national assets and financial resources. As a supervising ministry for entities related to taxation and remit of funds provided to government for various investment activity, its policies and related laws have an impact on the investment environment in the extractives industry.²⁶

²⁰ Environmental Management and Coordination Act, 2003, Section 58(2)<http://kenyalaw.org/lex//actview.xql?actid=No.%208%20of%201999>. Accessed on 19th June 2017.

²¹ <http://kenyalaw.org/lex//actview.xql?actid=Const2010>

²² Kenya Mining Investment Handbook 2016 at pg. 17 <http://www.mining.go.ke/wp-content/uploads/2016/11/Kenya-Mining-Investment-Handbook-2016.pdf> accessed on 27th June 2017.

²³ <http://www.mining.go.ke/wp-content/uploads/2016/11/Kenya-Mining-Investment-Handbook-2016.pdf>

²⁴ Section 15(2) of the Investment promotion Act, 2004 <http://www.kenyalaw.org/lex//actview.xql?actid=No.%206%20of%202004>. Accessed on 19th June 2017.

²⁵ <http://www.mining.go.ke/wp-content/uploads/2016/11/Kenya-Mining-Investment-Handbook-2016.pdf>

²⁶ <http://www.mining.go.ke/wp-content/uploads/2016/11/Kenya-Mining-Investment-Handbook-2016.pdf>

3.2.3. Mining Rights Allocation

A mineral right in Kenya refers to a prospecting licence; retention licence; mining licence; prospecting permit; mining permit; or an artisanal permit.²⁷ All the aforementioned permits relate to small scale operations which authorises its holder to carry out prospecting operations²⁸. On the other hand, a **prospecting licence** is a licence relating to large scale operations which authorises the holder to carry out prospecting operations. The allocation of these licences and permits is clearly stipulated under the Mining Act, 2016. It is also notable that the Cabinet Secretary may, on behalf of the State, on the advice of the Mineral Rights Board, negotiate with an applicant for or holder of a prospecting licence, a retention licence or a mining licence in respect of large scale mining or exploitation of minerals in the marine and terrestrial areas in accordance with the provisions of this Act and any other written law.²⁹

This assessment focused on the Mining License, Land Access Licence and Environmental Impact Assessment License.

- A mining licence is a licence relating to large scale operations which authorises the holder to carry out mining operations.
- An environmental impact assessment licence on the other hand refers to an environmental impact assessment licence granted under the Environmental Management and Coordination Act, 1999.³⁰
- An environment impact assessment refers to systematic examination conducted to determine whether or not a programme, activity or project will have any adverse impacts on the environment.³¹ Land access licence in this context encompasses the right granted to companies to utilize a given piece of land for purposes of mining operations.

TI-Kenya's focus on the large scale operations' licensing regime was informed by the fact that the mining sector is emerging in Kenya and there is minimal existence of research that has been conducted on these aspects. It was therefore crucial that the research be undertaken to identify the underlying and potential vulnerabilities to corruption within the licencing chain.

The procedure for acquiring the above licences is as stated below;

Mining Licenses (Exclusive Prospecting Licence (EPL) & Mining Lease (ML))

In Kenya, mining licenses are issued on a first come first served basis³² directly by the Ministry of Mining through the Cadastre Agency which is the statutory agency that manages the mineral rights through the life of mining operations. The Kenyan Cadastre System is intended to act as an Online repository and information management tool for regulating the licensing and the permitting of mineral rights, dealer's rights, import permits and export permits.³³

²⁷ S 4 of the Mining Act 2016

²⁸ S 4 of the Mining Act, 2016

²⁹ S 118 of the Mining Act 2016

³⁰ S 2 of the Mining Act, 2016

³¹ S 2 of the Environmental Management and Coordination Act, 1999

³² S 56 of the Mining Act, 2016-<http://kenyalaw.org/lex/actview.xq?actid=No.%2012%20of%202016>. Accessed on 24th June 2017.

³³ R 8(1) of the Mining (Licensing and Permitting) Regulations, 2016, <http://www.mining.go.ke/wp-content/uploads/2017/01/Mining-Licensing-and-Permitting-Regulations-25-08-16.pdf> accessed on 26th June 2017



The table below gives an outline of the process and information on the time it takes in every step of the process.

TYPE OF LICENCE	RIGHTS CONFERRED	PROCEDURES	TIME FRAME (APPROX)	NOTES
Exclusive Prospecting License (EPL)	To carry out detailed geological investigations to quantify the mineral deposit over large areas in unclosed zones	Have a valid prospecting license	< 1 day	EPLs are issued for one year and renewed annually for up to 5 years
		Consents from land owners	One or more days	
		Consents from county governments in case of trust land	One or more days	
		Apply for the EPL by filling form 6 and enclosing , Prospecting Right, Company Registration Documents, sketch plans and area description, proposed work programme, expenditure proposals, experience and financial capability	1 day	
		Application is checked before recommended to the Mineral Rights Board (MRB)	MRB sittings to be determined	
		Application is published in the Kenya Gazette for any objections within 30 days from the date of publication	30 days	
		If no objection, license document prepared upon payment of necessary fees and duty	1 – 7 days	
Mining Lease (ML) or Special Mining Lease (SML)	Right to mine the mining deposits established under preceding exploration licenses i.e. EPLs	Undertake mining feasibility study on the established mineral deposit	1 – 6 months	-Subject to EIAs approval
		Undertake cadastral survey of the deposit area by a registered surveyor & have it approved by the Director of Surveys	1–2 months depending on acreage	-MLs issued for duration between 5 – 21 years & renewed for duration not exceeding 21 years

Source: www.mining.go.ke

Table 4: Mining License Application Procedures

The research established that issuance of mining licences had been suspended following the enactment of the Mining Act, 2016 as the new cadastral agency was being reconstructed to align with the Act. The Cadastre Portal which is the Repository for the Ministry neither provides information on the number of licenses issued nor the status of the license applications. The portal only provides a map of the geographical locations in Kenya where different awards (Licenses and permits) have been issued with no conclusive information on the same to inform this assessment³⁴. Additionally, the Mineral Rights Board which makes recommendations on issuance of licences to the Cabinet Secretary is yet to be operationalized.

³⁴ Map portal at <https://portal.miningcadastre.go.ke/Site/EmbeddedMapPortal.aspx?PageID=f877b9bc-d68a-415f-b051-5048ff5a68b0> accessed on 26th June 2017.

Land Access Licence

The centrality of land in the social political discourse in Kenya is as closely related to the governance practices at the national and local level. Land has been a key feature in political events in Kenya including the struggle for national independence, a series of post-election flare-ups and the constitutional review debate.³⁵ The Land Access Licence is a very important requirement for mining companies to operate in different locales in the country. It is incumbent on the mining company making an application for a mining license to ensure that the land under license is available for that purpose. This means that the process of applying for a mining license is done almost simultaneously with the application for land use permits.³⁶ Land access licences are usually borne out of a negotiated process and this marks the entry of the concept of Free Prior Informed Consent (FPIC). Communities around the land in question need to be consulted by the mining company and educated on the consequences of the mining operation before they can give that permission to the company.

Environmental Impact Assessment Licenses

Mining operations under the environmental laws of Kenya are required to conduct environmental impact assessments and receive a license. The process is supervised by the National Environmental Management Authority (NEMA) and requires that a registered EIA expert conducts the study and develops appropriate action plans. “The EIA process requires a period for public participation and project owners are required to hold at least three public meetings with the affected parties and communities. Once an EIA study is completed and filed, and authorities are satisfied as to the adequacy of the EIA, NEMA will issue an environmental impact assessment license. The license is issued subject to such terms and conditions as may be appropriate and necessary to facilitate sustainable development and sound environmental management. Implementation of the EIA, its requirements, plans, and recommendations remain the purview of the project owner.”³⁷

The focus on the mining licence, environmental Impact assessment licence and the land access licence is based on the fact that mining operations impact on both land and the environment and companies are under obligation to receive authorization from the relevant licencing agencies to conduct their operations. There exist different procedures to acquire such authorization which increases the likelihood of exposing the process to corruption risks.

³⁵ The East African Bribery Index, Trends Analysis (2010 -2014)

³⁶ Varsha Venugopal, 2014. Assessing Mineral Licensing in a Decentralized Context: The Case of Indonesia. NREGI briefing Paper

³⁷ Kenya Mining Investment Handbook 2016 pg. 42

Chapter Four

FINDINGS

4.1. Contextual Factors of the Mining Sector

4.1.1. Political Factors

This assessment established that there is a high likelihood for political interference and vested interests in the mining sector in Kenya.³⁸ The discussions further established that some politicians and senior government officials have interests in mining and some of them actively run mining operations while others have exploration licenses. In some cases, politicians, driven by economic interests, have incited communities to invade mining rights of miners who seem to hold lucrative deposits of minerals. A case in point is in Taita Taveta County where an organised gang waylaid and killed Campbell Bridges (who discovered the famous Tsavorite) and the family blamed some local politicians keen to muscle-in on Campbell's lucrative mining operations.³⁹ As a high degree of political interest permeates the sector it is observed that due diligence is not conducted by the licensing agencies to ascertain the real owners of exploration and mining companies. According to some respondents from the government and civil society, this means corrupt individuals and companies can easily obtain licenses.

The issue of land and other associated properties was discussed with key respondents regarding the security of tenure/occupancy of land by communities or settlers. Article 40 of the Constitution of Kenya, 2010 recognises the right to own property and a right not to arbitrarily be deprived of this right but cases have been reported to the contrary according to a key informant from the National Land Commission. Furthermore, Kenya was ranked 88 out of 128 countries in the 2016 International Property Rights Index which measures a country's level of protection of private property.⁴⁰ While Kenya is not at the tail end of the index, this position is indicative of a system where security to property is not absolute despite the law providing so. The National Land Commission's Chairperson was interviewed in this assessment, and he acknowledged the threat posed by unclear practices in land administration and how these opens an avenue for corruption especially during the licensing process.

Following several corruption scandals, The Constitution of Kenya (Amendment) Bill, 2016 which sought to replace the anti-corruption agency with a powerful office that has powers to prosecute was tabled for discussions in parliament.⁴¹ The president, while giving a speech on Governance at a Summit held at State House in October 2016, expressed frustration at the pace by which the different agencies were moving to fight corruption. He further indicated that this office was helpless in curbing corruption in the country.⁴² The cadastre agency has not had an open-door policy to external stakeholders therefore lacking the scrutiny that may expose some of its practices.⁴³ A former employee at the Ministry of Mining attributed the secrecy to mining companies not embracing disclosure of information in their processes. A report titled: 'Kenya: Realising the Right to information by Article 19 East Africa'⁴⁴ (a global right to information advocacy organisation) detailed the systematic lack of access to information in the public service space.

³⁸ Feedback received from FGDs held in Kitui, Kwale and Taita Taveta counties

³⁹ <http://www.dailymail.co.uk/news/article-2880277.html>

⁴⁰ <http://internationalpropertyrightsindex.org/countries>

⁴¹ <https://www.standardmedia.co.ke/article/2000199991/house-to-set-up-anti-graft-agency-with-more-powers>

⁴² <http://www.standardmedia.co.ke/mobile/amp/article/2000220200/i-am-frustrated-by-corruption-says-president-uhuru-kenyatta>

⁴³ <http://www.standardmedia.co.ke/mobile/article/2000095810/>

⁴⁴ <https://www.article19.org/data/files/medialibrary/38388/Kenya-RTI-for-web.pdf>, 6, 7.

4.1.2. Institutional & Administrative Factors

Following the constitution of government after the 2013 general elections, the Ministry of Mining was established as an independent Ministry away from the Ministry of Environment and Natural Resources which initially was mandated to oversee all mining related activities.⁴⁵ The Ministry has continued to oversee the implementation of various regulatory frameworks to govern the sector. The new frameworks are beginning to be effected and although they are a marked improvement from the previous frameworks, their full effectiveness are yet to be recorded.

It is important to note that there are factors that affect the effective implementation within the framework. Some of these factors include: Lack of proper coordination within the different inter-government agencies in implementation of shared functions. For example, the shared roles between the Ministry of Mining and the National Land Commission.⁴⁶ A key official from the National Land Commission indicated that there were challenges with communication between the Ministry and the National Land Commission. There have been public feuds between the two institutions over some specific mining operations in the country e.g. reports were previously published regarding an incident in which the respective heads of these two institutions publicly differed over a mining project that was embroiled in a land dispute with a group of land owners.⁴⁷

The Mining Act, 2016 establishes a mineral rights board which has been operationalized. However concerns have been raised by the leadership of the Kenya Chamber of Mines regarding qualifications of certain nominees who did not meet the minimum required qualifications.⁴⁸ This assessment also noted the lack of a structured programme to align staff to carry on their work in a transparent and accountable manner.⁴⁹

4.1.3. Economic Factors

Kenya is reported to have the most resilient and diversified non-resource based economies in Africa.⁵⁰ Despite this ,there has been limited focus on the extractive industry since independence. It is only until a few years ago when new discoveries were made such as oil in Turkana and coal in Kitui among others that more attention was drawn to the sector. The current contribution of the entire extractive sector to the GDP is about 1% however, it is important to note that the Extractives sector in Kenya has the potential to improve to a forecasted increase of 4%- 10%.⁵¹ This is mainly due to the focus placed in the sector since 2013 and a raft of supporting structures that have been put in place such as the planned aerial geophysical survey that is aimed at mapping the country's mineral wealth.⁵² The survey is key as it will provide clear information on the potential size of mineral wealth. The Kenyan government has made steps in investing resources in the mining sector. During the 2013/2014 financial year, the government allocated Kshs. 52,799,142 for Construction of new accredited laboratory at madini House in Industrial Area, Kshs 335,154,635 for purchase of a Drilling Rig and Kshs. 68,861,224 Ground and Aerial Survey and mapping of minerals in Mombasa, Kakamega & Kwale.⁵³

⁴⁵ www.mining.go.ke/?page_id=8

⁴⁶ Key informant interview held on 24th April 2017 at National Land Commission

⁴⁷ <https://www.goo.gl/am7g70>

⁴⁸ S 30 of the Mining Act 2016

⁴⁹ Key informant interview held on 24th April 2017

⁵⁰ <http://allafrica.com/stories/201701110114.html>

⁵¹ <http://www.mining.go.ke/wp-content/uploads/2016/11/Kenya-Mining-Investment-Handbook-2016.pdf>,pg 14. Accessed on 9th June 2017.

⁵² http://the-star.co.ke/news/2017/01/03/sh3bn-allocated-to-map-kenyas-minerals-axed_c1481004

⁵³ <http://www.mining.go.ke/index.php/projects/fiscal-year-2013-2014>



The budget statement for the financial year 2017/2018 has also factored in Ksh 200 million for geological mapping and mineral exploitation, Ksh 150 million for a geological databank, Ksh 103 million for a mineral certification laboratory and Ksh 140 million for mineral audit support and a further Ksh 140 million for acquisition of survey equipment.⁵⁴

4.1.4. Social Factors

This assessment established that most Kenyan citizens are not well acquainted with the mining sector but have an idea about the oil and gas sector. Further, there has been low engagement of communities living in mining areas despite progressive provisions on public participation articulated in the Constitution of Kenya 2010. It is however notable that civil society actors are actively sensitising communities about the sector and the implications to their habitat and their livelihoods. Organizations such as Caritas in Kitui County have designed progressive awareness campaigns targeting select mining hotspots in the County to improve community understanding of the mining laws.⁵⁵ Incidentally, most of these communities are found in rural backdrops where a sense of systematic marginalisation prevails because of the poverty levels that have been recorded. The community members in *Kishushe* in *Taita Taveta* County where an iron ore mining project operates confirmed, during a focus group discussion,⁵⁶ that poverty levels had soared over the years.

All the community representatives interviewed (Kwale, Taita Taveta and Kitui counties) expressed dissatisfaction with their relationship with the mining companies that operate in the areas. This was corroborated by institutions that operate in the target areas such as the KNCHR and Caritas who indicated that mining companies have not devised effective methods to engage with the communities.

A representative of a mining company operating in Kitui County pointed out that members of the community contribute to corruption in some instances by building special working relationships with the mining companies by purporting to have immense influence over the communities and thereby soliciting for benefits from the companies.

4.1.5. Technological Factors

Kenya is fast embracing technology to drive a myriad of functions. The ministries of Mining, Land and Environment have taken steps to automate some of the core functions and services such as licensing. The Ministry of Mining rolled out a new Online Mining Cadastre (OMC) to be used by all applicants for exploration and mining licenses. The online system is aimed at increasing efficiency and transparency in the grant of mineral rights and concession management.⁵⁷

It is notable that the online system is similar with the one being used in South Africa (called SAMRAD) and Zambia and is administered by the same company.⁵⁸ The system has been faulted in South Africa for containing flaws that affect transparent and efficient issuance of licenses but Kenya's version remains to be evaluated on efficiency and accountability. The Ministry of Land is also in the process of digitising the lands registry as well as placing some functions online. This ministry has a history of corruption that is allegedly controlled by land cartels and several efforts over the years to eliminate them has proved challenging.⁶⁰

⁵⁴ Statement Delivered To The National Assembly On 30th March, 2017 By Mr. Henry K. Rotich, Cabinet Secretary For The National Treasury, Republic Of Kenya,

⁵⁵ Interview with representative from Caritas Kitui held on 11-01-2017

⁵⁶ Focus group discussions held with Kishushe community members on 28th February 2017.

⁵⁷ <http://www.mining.go.ke/wp-content/uploads/2016/11/Kenya-Mining-Investment-Handbook-2016.pdf>, pg 28-accessed on 9th June 2017

⁵⁸ www.mining.go.ke

⁵⁹ www.goo.gl/B1AEC

⁶⁰ <https://goo.gl/BLqHFM>

The Ministry of Mining plans to carry out an aerial geophysical survey of the entire country to ascertain the availability and location of different minerals. This use of modern technology for mapping is expected to give the country a clear picture of its mineral wealth and consequently attract more mining investors.⁶¹

4.2. Mining License Award: By Law and By Practice

Prior to the enactment of the Mining Act 2016, the mining licensing regime was characterized by numerous irregularities which led to formation of a task force to review mining licenses and agreements issued by the Mines and Geological Department to establish whether correct licensing procedures were adhered to while issuing companies with a prospecting, exploration and mining license.⁶² Media reports indicate that the task force report documented massive irregularities in the issuances of licences.⁶³ However, the information could not be corroborated as the task force report was not readily /publicly available during this assessment.

In 2016 a new online cadastre system was piloted and thereafter proposed as a replacement of the old system. This risk assessment chose not to make a retrospective analysis of the old system because its use was discontinued in May 2016. The new system, that is undergoing harmonisation with the new Mining Act, has been designed to improve the whole process of issuing mining licenses.

Process of acquiring a license

A mining company first applies for an exploration license (therein termed as an Exclusive Prospective License - EPL). At the same time the company seeks consent from the land owners for use of land in exploration activities or from the County Governments in the case of trust land. In applying for the EPL, companies fill forms and enclose company registration documents, sketch plans and area description, proposed work program, expenditure proposals, experience and financial capability. The application is checked before being recommended to the Mineral Rights Board (MRB), which evaluates the application and subsequently makes a recommendation to the minister who finally gives approval for a license award.

Before the license is issued, the application is published in the Kenya Gazette for any objections that may arise within 30 days from the date of publication. If there is no objection, the license document is prepared upon payment of necessary fees and duty. The applicant can later apply for the Mining Lease (Mining License) which involves the company first undertaking a mining feasibility study on the established mineral deposit (including conducting an EIA and obtaining an environmental license). The company then carries out a cadastral survey of the deposit area by a registered surveyor and once the survey is done the company is issued with a mining license.⁶⁴ It is noted therefore that companies do not apply directly for mining leases but must first apply for a prospecting license which is then graduated to a mining lease.

This licensing process is not well known or understood by some of the stakeholders such as the affected communities. This was established during focus group discussions with the communities in Kwale, Kitui and Taita Taveta.

⁶¹ <http://gallery.cnbcfrica.com/video/?bctid=5384501030001>

⁶² Article titled "Balala unveils Task Force on review of mining licences and agreements", Madini Kenya at <https://www.scribd.com/document/159682745/Task-Force-on-review-of-Mining-Licences-and-Agreements> accessed on 28th June 2017

⁶³ <https://www.miningreview.com/news/kenyan-mining-audit-shows-massive-corruption/>

⁶⁴ <http://www.mining.go.ke/wp-content/uploads/2016/11/Kenya-Mining-Investment-Handbook-2016.pdf>. Pg 58 and 59. Accessed on 9th June 2017.



However, this assessment was able to piece together the steps companies follow to obtain mining licenses. The result was a clear process map which outlines the functions of the various institutions involved in the process.

Below are diagrammatic representations of the mining licensing process as set in the law in figure 3 and as the process is practiced in figure 4. Figure 3 below illustrates the legal process of obtaining a mining license by an investor in Kenya. It is however important to note that, Community Development Agreements' negotiation which is a critical aspect of this license application and award was not discussed in the flow chart below because the Draft Mining regulations governing the structure, time frame and the parties involved in this process had not been gazetted.

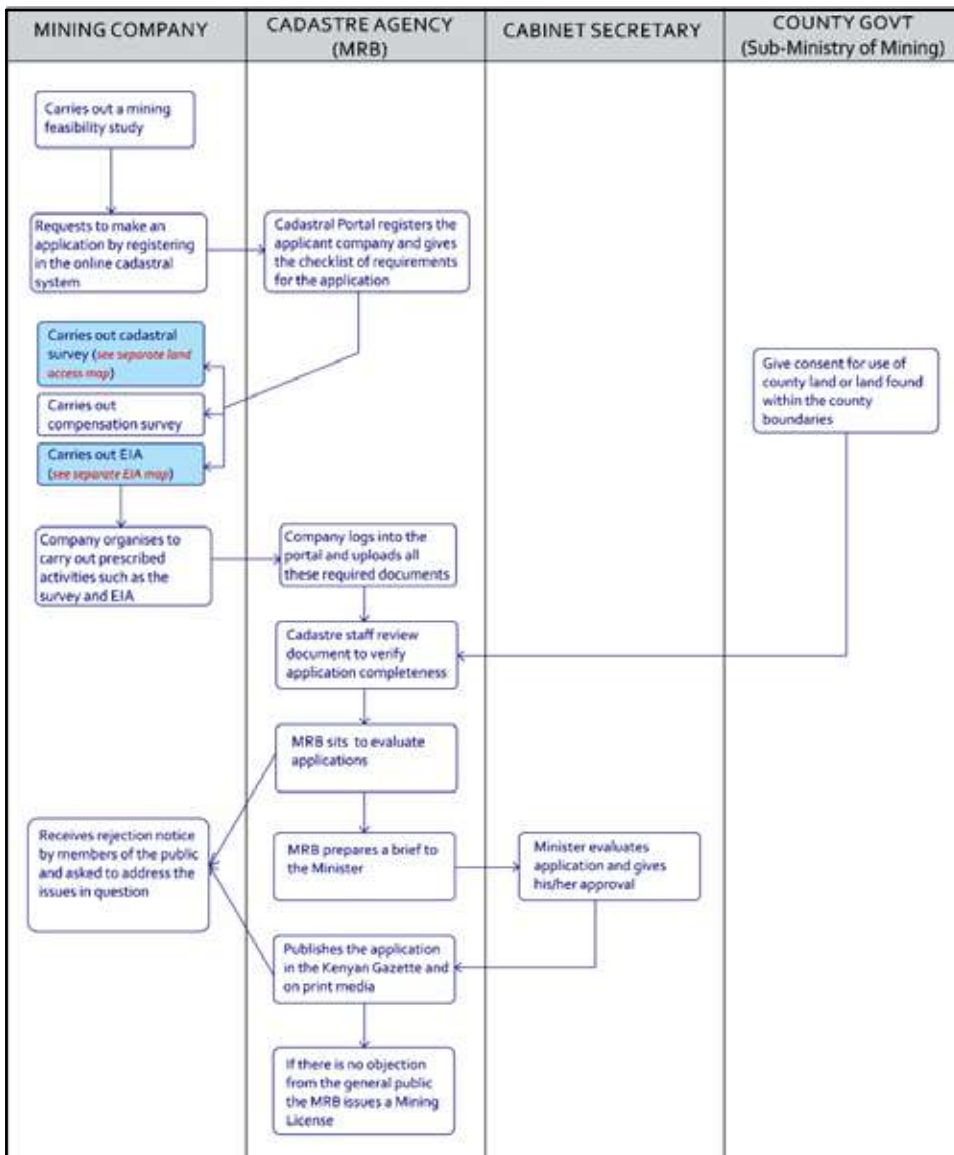


Figure 3: Mining License Process Map (by law)

Source: Kenya Mining Investment Handbook 2016

Appendix B: Application Procedures for Licenses and Permits⁶⁵

⁶⁵ <http://www.mining.go.ke/wp-content/uploads/2016/11/Kenya-Mining-Investment-Handbook-2016.pdf>.Pg 58-60. Accessed on 9th June 2017.

Mining License Process Map (Actual Practice)

The figure 4 below is a flowchart outlining the actual practice for the mining license process. It is important to note that the figure incorporates the aspects of the mining license process (as outlined by law in the previous figure) that is followed in practice as well as views on the actual practice as provided through key informant interviews with County government officials and the focus group discussions in the communities.⁶⁶ The views are outlined in a red font as seen in the figure.

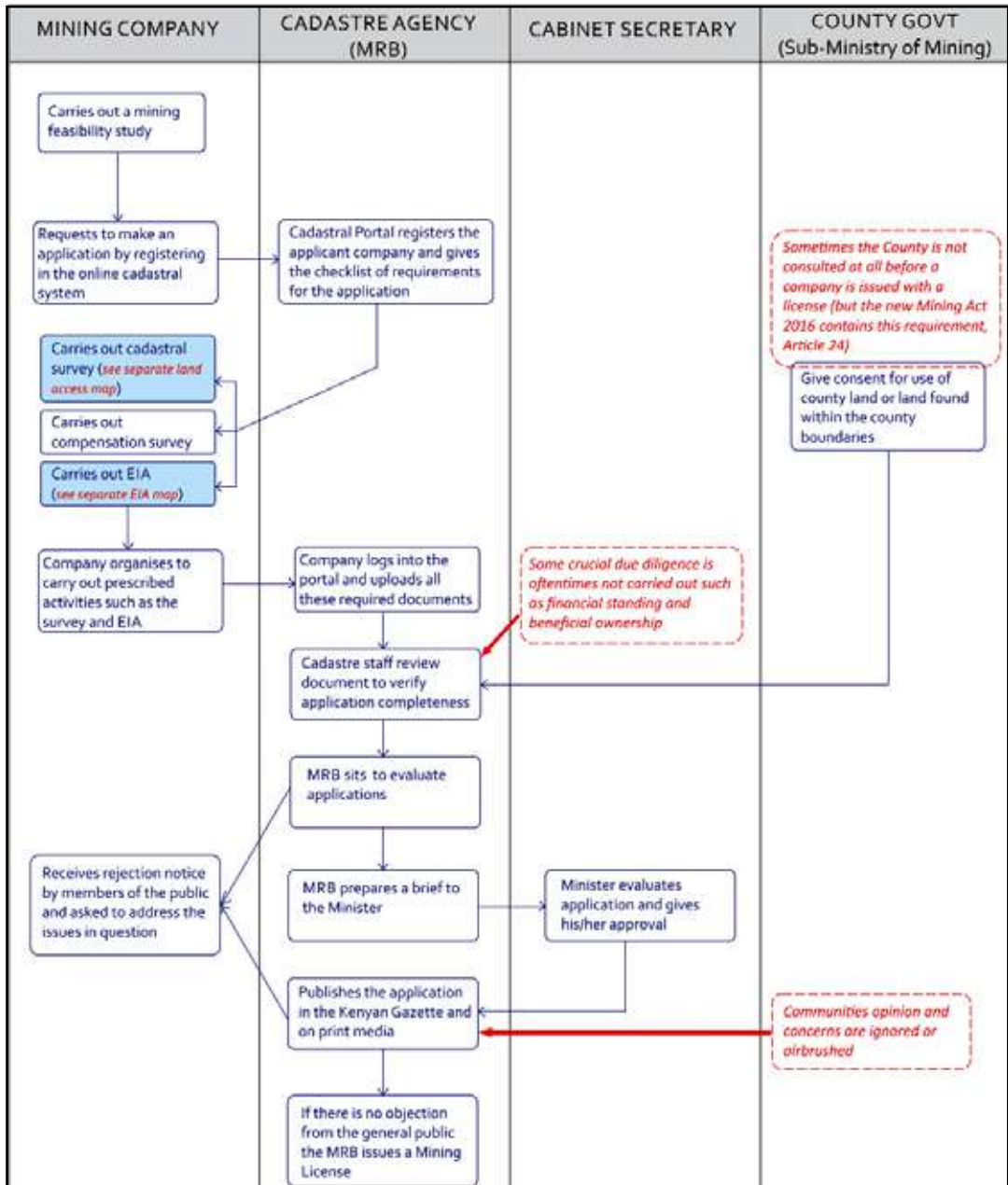


Figure 4: Mining License Process Map (Actual practice)

Source: Compilation from Kenya Mining Investment Handbook 2016 and key informant interviews with 4 County government officials and community focus group discussions.

⁶⁶ Key informant interviews held with 4 county officials in Kitui, Kwale and Taita Taveta between 12th January 2017 and 20th February 2017 and county focus group discussions with communities between 19th January and 28th February 2017.



4.3. Land Access Licence: By Law and By Practice

The land access licence is one of the prerequisites to issuance of a mining license. Companies are expected to seek permission from the land owners/occupiers as well as county Governments' consent in case of trust land.⁶⁷ In Kenya, land is classified into three types based on ownership: Private land, public land and community land.⁶⁸ Therefore, access to own or utilise land in the country depends on the type of ownership of the land in question. The National Land Commission is mandated to manage public land on behalf of the National and County Governments.⁶⁹ The two tables below illustrate the official process of land access and by actual practice. The two maps indicate the steps followed and the parties involved. The information in the figures below was enriched by the key informant interviews held at the National Land Commission with different officers.⁷⁰

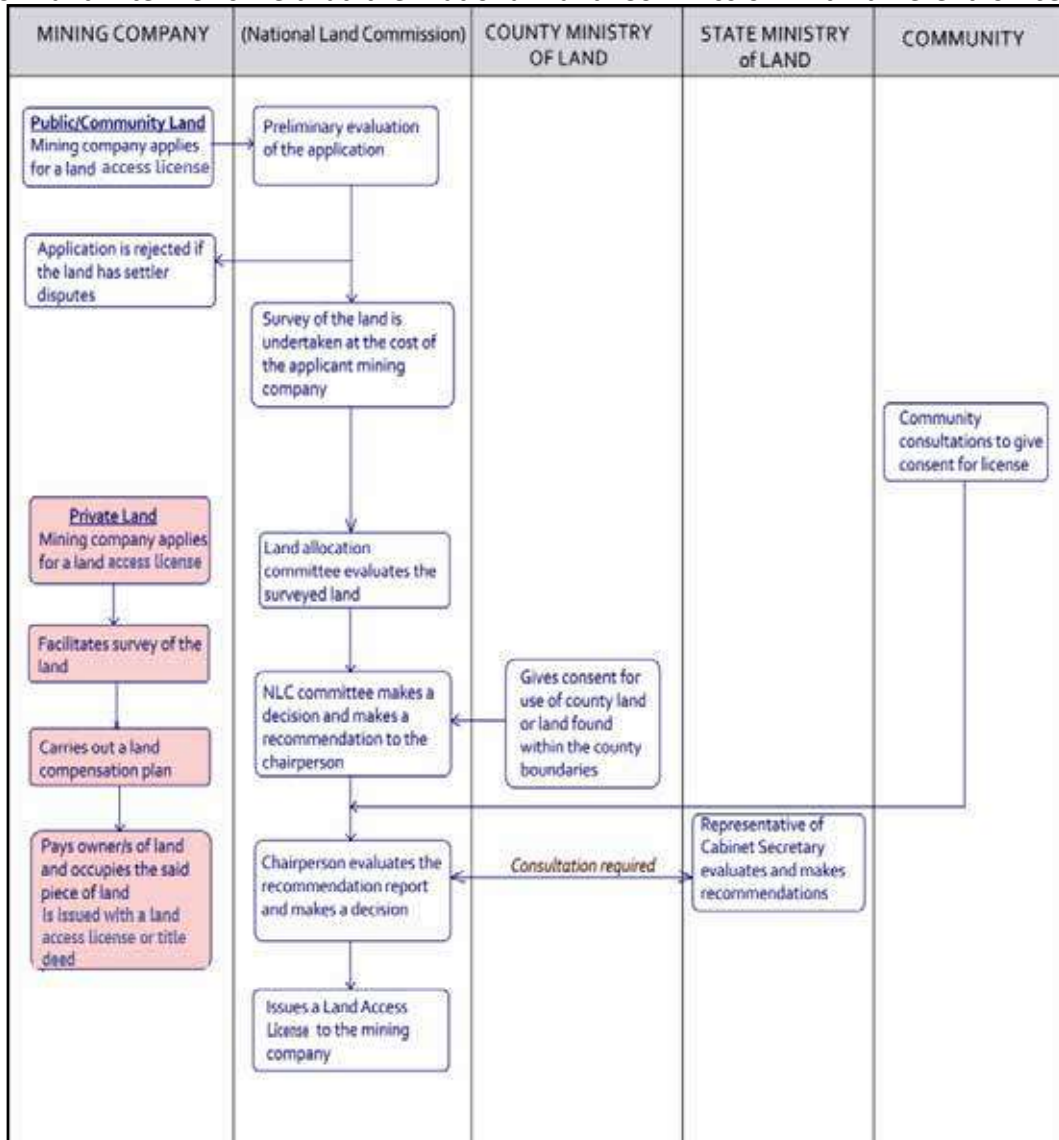


Figure 5: Land Access License Process Map (by law)

Source: Key informant interviews with 5 officers from the National Land Commission⁷¹

⁶⁷ <http://www.mining.go.ke/wp-content/uploads/2016/11/Kenya-Mining-Investment-Handbook-2016.pdf>,Pg58

⁶⁸ Art. 61 (2) of the Constitution of Kenya, 2010.

⁶⁹ Article 67 (2) (a) of the Constitution of Kenya

⁷⁰ Key informant interviews held with 5 officers at the National Land Commission between 16th and 24th April 2017.

⁷¹ Key informant interviews held with 5 officers at the National Land Commission between 16th and 24th April 2017.

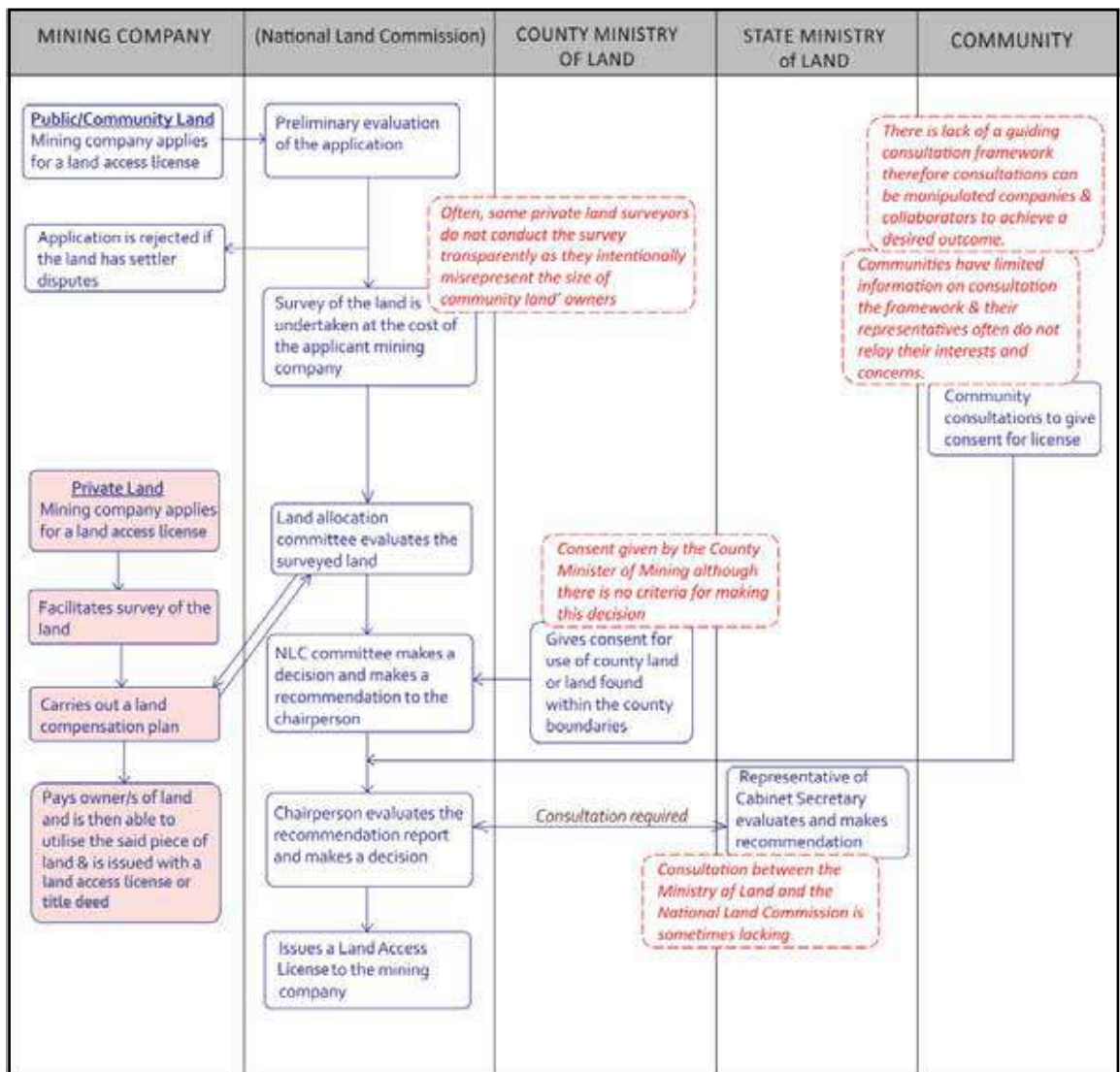


Figure 6: Land Access Licence Process Map (Actual Practice)

Source: Key informant interviews with 5 officers from the National Land Commission

4.4. Environmental Impact Assessment License Award: By Law and By Practice

Vulnerability to corruption in the process of obtaining the Environmental Impact Assessment licence is highly likely. This is due to the nature and structure of the process where the proponent (Mining Company) has the sole mandate to commission the experts who carry out the Environmental and Social Impact Assessments. To this end, the experts may feel obligated to write favourable reports which might not adequately capture the potential impacts and their subsequent mitigation measures.⁷² This inevitably causes mining-related environmental degradation over time. Additionally, the government agency National Environment Management Authority (NEMA) whose role is to review environmental and social impact assessment reports, at times faces interference from officials who attempt to solicit bribes to compromise this exercise since these officials have the power to block, delay or frustrate a project.⁷³

⁷² Article by John O. Kakonge titled Kenya: Environmental Impact Assessment - Why It Fails in Kenya at <http://allafrica.com/stories/201510122473.html>. Accessed on 28th June 2017.

⁷³ <http://allafrica.com/stories/201510122473.html>. Accessed on 26th June 2017



The process is as shown in the maps below;

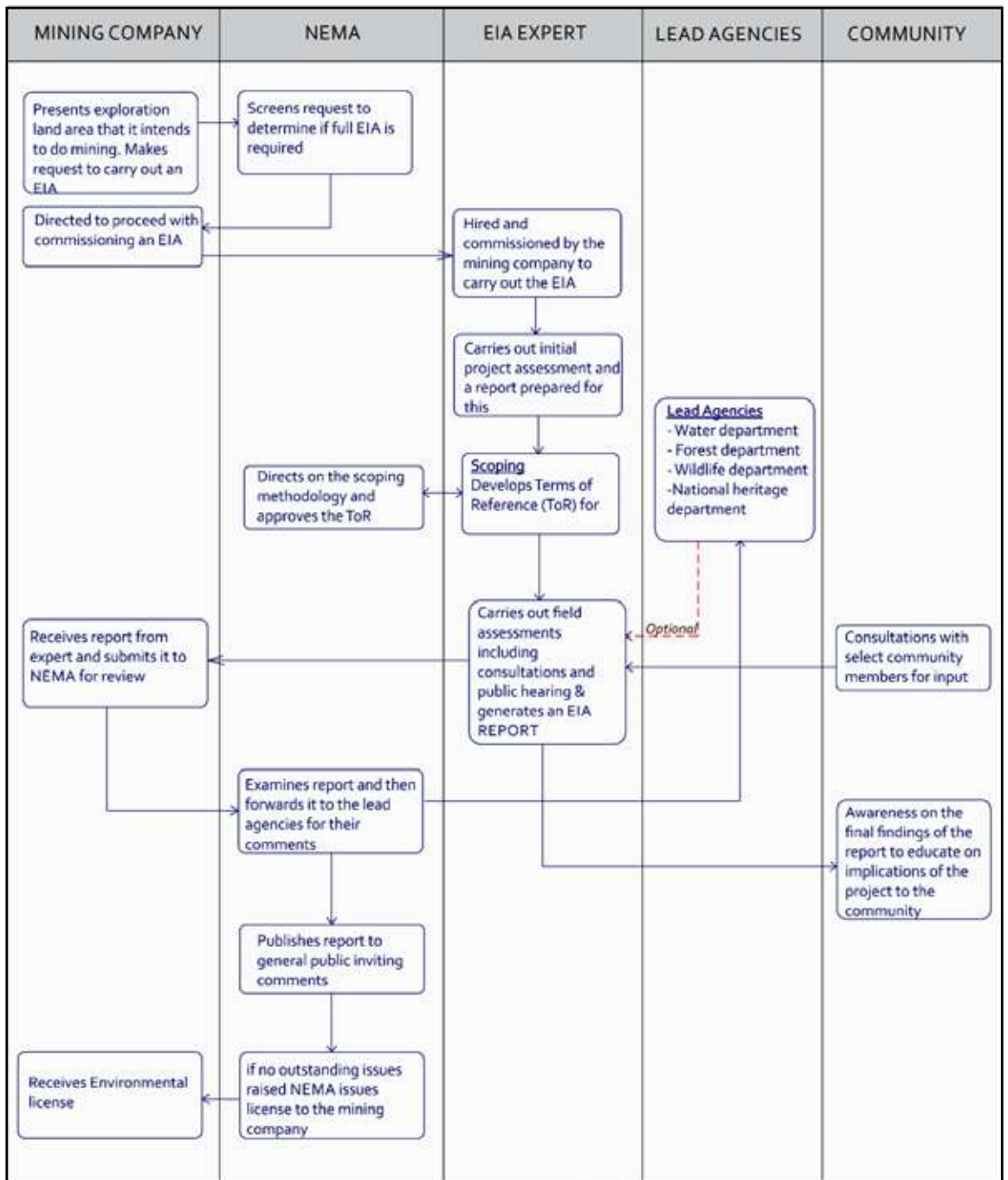


Figure 7: Environmental Impact Assessment Licence Process Map (by law)

Source: Key informant interview with NEMA EIA team

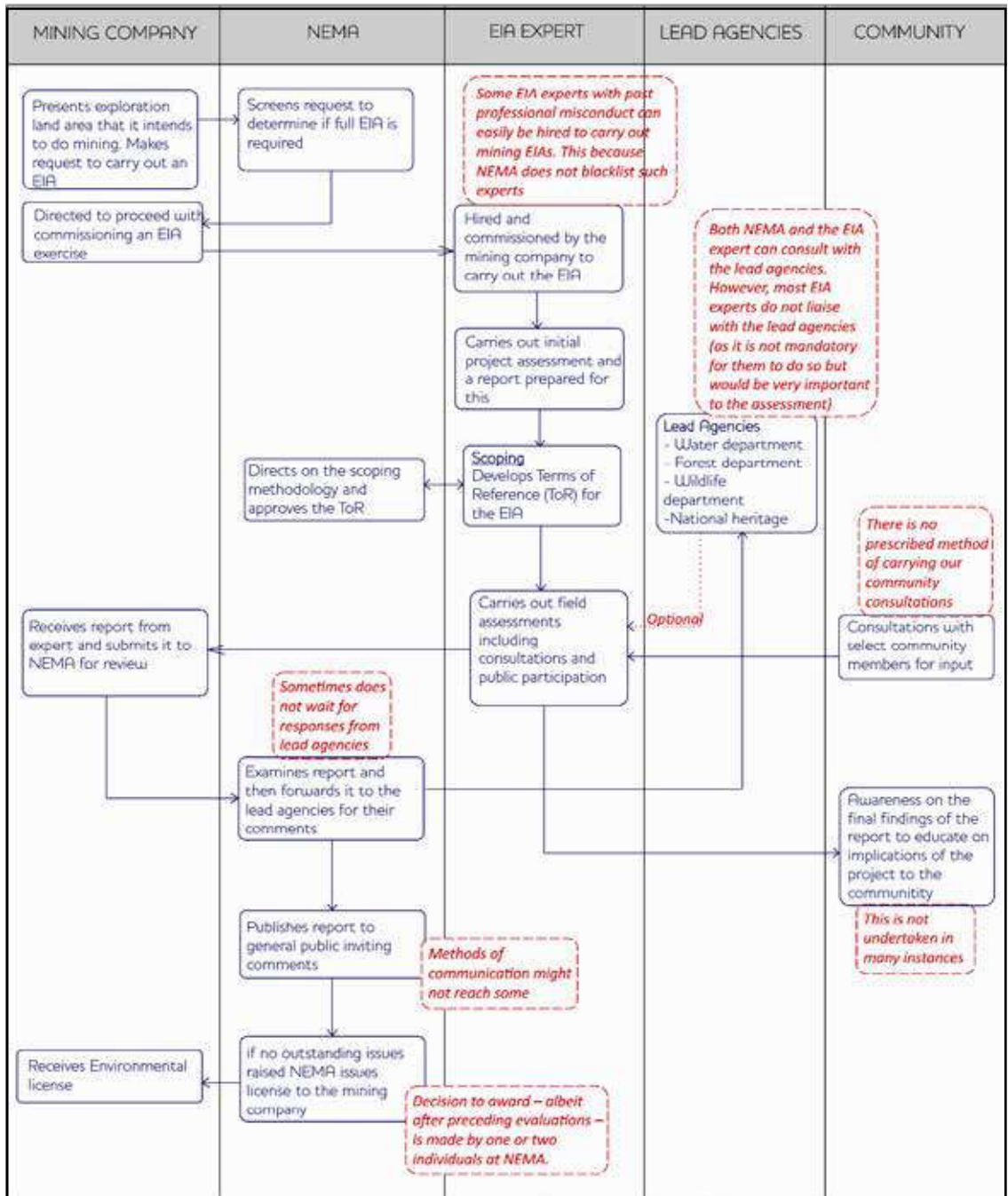


Figure 8: Environmental Licence Process Map (Actual Practice)

Source: Key informant interview with NEMA EIA team

4.5. Key Vulnerabilities and Corruption Risks Identified

The table below shows some of the key vulnerabilities and corruption risks identified following analysis of the context in which the three award processes are conducted; This risks will further be presented in chapter five (5) in terms of the likelihood of their occurrence and impact that would be caused by their occurrence.



CF – Contextual Factors: e.g. business environment where corruption has become an accepted practice.

PD – Process Design: e.g. the process does not include steps that provide controls to encourage transparency.

PP – Process Practice: e.g. actual practices that create incentives to be corrupt or undermine controls.

RA – Accountability: e.g. weak or non-existent accountability mechanisms within the licensing agency.

RL – Legal Responses: e.g. weak or non-existent laws/regulations/legal mechanisms, even after corruption is identified.

Vulnerabilities	Resulting corruption risks
<p>Social Factor: Some mining companies are issued with licenses to operate within communities that rely on subsistence farming and grazing. The potential impact on water sources, farmlands and pasture lands is not given much priority. Consequently, the ecosystem of the community is affected and it is then that the mining company begins to put in place control measures such as provision of water from external sources. Sometimes resettlements are done when impacts seem difficult to control.</p>	<p>1. CF3: What is the risk that surface rights in areas being opened for mining are not clear in law?</p>
<p>Social Factor: It is common practice that some people purchase land adjacent to a mining site even before the project begins and before the locals have good knowledge of the impending mining operation. Since land is an important asset in Kenya this land speculators thereafter sell/lease the land to parties affiliated to the mining operation at good profit. This has also been reported in the local oil sector. This means the land is corruptly acquired because the locals do not make informed sale of their lands.</p>	<p>2. CF4: What is the risk that there will be corrupt speculation around land subject to a mining permit application, such as by officials working with collaborators to change the status of the land to extract payments out of the license-holder?</p>
<p>Social Factor: Many companies that make applications for either prospecting license or the mining license in Kenya are small or medium sized companies. These are companies with a relatively small capital chest and therefore they place high stakes in their prospective projects. Under these circumstances, the companies could easily resort to corruption in securing mining licenses and permits.</p>	<p>3. CF8: What is the risk that a proposed project is critical for the survival of the applicant?</p>
<p>Political Factor: There are a number of mining operations that are owned by politicians and there are more prospecting companies owned by politicians and their associates. Therefore, it is easy for these politicians to interfere with the licensing process because of their power and connections with the higher powers that be.</p>	<p>4. PD22 (modified): What is the risk of external interference in the award agencies' awarding of licenses etc?</p>
<p>Political Factor_: The cadastre agency does carry out due diligence to find out beneficial owners of mining companies that make applications for licenses. Beneficial owners of these companies could be senior public officials or politicians. So, it is possible and easy for these senior public officials and politicians to try to influence the licensing processing in their favor.</p>	<p>5. CF10: What is the risk that senior public officials or politicians will not declare assets, shares or income related to mining interests?</p> <p>6. PD9: What is the risk that applicants for licenses etc will be controlled by undeclared beneficial owners?</p>

<p>Political Factor :_There is a general lack of palatable information for the general public regarding mining sector license award processes. The government has also not made effective efforts to provide this knowledge or readily provide information to those who request for the same. This poses a hindrance to proper scrutiny of the award process</p>	<p>7. PD3: What is the risk that the steps of an award process will not be publicly knowable?</p> <p>8. PD4: What is the risk that criteria for awarding licenses etc will not be publicly knowable?</p> <p>9. PD11: What is the risk that geological data about specific license areas will not be publicly knowable?</p> <p>10. RA2: What is the risk that information about a particular license etc that has been awarded is not legally available?</p>
<p>Institutional & Administrative Architecture Factor: The public sector in Kenya has made efforts over the past years to promote competitiveness within the sector. For instance, the Salaries and Remuneration Commission in February 2017, instituted a process of salaries and job cadres review which is expected to be operationalized in July 2017. The cadaster officials are ordinary civil servants who are remunerated according to government salary scales which are considered to be within the living wage. It is however important to note that the risk of engaging in corruption because of earning salaries less than a living wage is advanced to a great extent by personal morals and fabric of an individual. Secondary employment by cadastre officials is a possible situation. Despite the ministry having a conflict of interest clause through the human resources policy, some individuals who do not truthfully declare all their interests could still be involved in secondary employment with mining companies.</p>	<p>11. PD5: What is the risk that salaries of cadastre (or equivalent) agency staff are less than a living wage?</p> <p>12. PD6: What is the risk that cadastre agency officials will engage in Secondary employment with mining companies?</p>
<p>Land Access Process Maps: Although a law on consultation with communities or landholders exists there are no clear regulations to guide how these consultations should be carried out. Furthermore, most communities do not understand the processes involved in land acquisition or EIAs. Therefore, there is a risk that consultations carried do not meet the desired minimum elements.</p>	<p>13. PD8: Assuming consultation with communities or landholders is required, what is the risk that the legal framework for consultation is not publicly knowable?</p>
<p>Economic Factor 3: The country does not have sufficient technical information on the country's mineral wealth. The little information that is available is not publicly known so this could create an environment where a mining company could bribe cadastre officials to unfairly obtain this information.</p>	<p>14. PD11.2: What is the risk that geological data about specific license areas will not be publicly knowable?</p>
<p>Institutional & Administrative Architecture Factors: The Mineral Rights Board (MRB) has members appointed by the cabinet secretary in charge of mining. Although there is a criteria for their selection, there is a likelihood that it will comprise of individuals who have carefully been selected to serve certain interests.</p>	<p>15. PD13 (modified): When license assessment boards are used in the awards process, what is the risk that people appointed to the board are not independent, e.g., because they have been carefully chosen by the government to create a specific outcome?</p>

<p>Institutional & Administrative Architecture Factor 4: There exist integrity standards within the awarding however, there is no clear framework to communicate with prospective companies on the need to adhere to certain integrity standards when making applications for licenses and subsequently after obtaining the licenses.</p>	<p>16. PD15: What is the risk that mining companies will not know the governance requirements around the process for awarding licenses etc?</p>
<p>Social Factor: Negotiations with communities are not comprehensive and not widely consultative. Cases have been reported where some key community members are co-opted by the mining companies in different ways such as bribes so that they could bid for the company within the community. This effectively affects the integrity of the negotiations and agreements that follow.</p>	<p>17. PD16: Assuming consultation with communities or landholders is required, what is the risk that negotiations for landholder or community agreements can be manipulated?</p>
<p>Political Factor: There is insufficient provision of information to the public about the mining industry. As much as the regulatory framework has changed in favour of public access to information it is still not very easy to obtain information on the mining sector due to non-legal/policy barriers. This effectively ensures that a critical mass of the public is not privy to what happens in the sector especially on the licensing process.</p>	<p>18. PD36: What is the risk that details of licenses etc that have been awarded will not be publicly known?</p> <p>19. PD39: What is the risk that a license, permit of contract will be terminated without being publicly explained or justified?</p> <p>20. PD40: What is the risk that a license or permit will be renewed without being publicly explained or justified?</p>
<p>Technological Factor : The old cadastre system consisted of many 'idle' licenses. The new online system has not gotten rid of many of these 'idle' claims so it is possible for companies to stockpile a number of licenses/permits mainly for speculative purposes. This renders unavailable some of the concession areas which would otherwise be issued out to serious mining companies.</p>	<p>21. PP4: What is the risk that mining companies can stockpile licenses or permits, without actually doing any work?</p> <p>22. PP5: What is the risk that upgrades to the cadastre data system will not capture and resolve overlaps, inaccuracies or other conflicts?</p>
<p>Mine License Map, Land Access Map, Environmental License Map: The nature of consultations is often not comprehensive and thereby it is easy for the views of the community to be ignored and even the few people chosen to represent the communities will often be coopted by the mining company and therefore would not fully represent the community interests.</p>	<p>23. PP6: Assuming consultation with affected communities is required, what is the risk that their free, prior, informed consent will be ignored as a result of corrupt practices?</p> <p>24. PP7: What is the risk that community leaders negotiating with a mining company will not represent community members' interests?</p>
<p>Environmental Impact Assesment License Maps: EIAs are adopted as presented by the consultants in most cases because the NEMA EIA department is understaffed and have a lot of EIA reports to review. This gap becomes an incentive for some EIA experts to present false information but this creates a risk of the environment suffering unforetold impacts and degradation.</p>	<p>25. PP9: What is the risk there is no verification of the accuracy or truthfulness of environmental impact assessment (EIA) reports?</p>

<p>Mining License Map (Official): Financial capacity and integrity are basic requirements for issuance of mining licenses in Kenya however, there is no framework to make a follow up to ascertain the truthfulness of these submissions. This poses a risk to the country as the sector risk retaining sub-standard companies whose socio-economic impact will be below the expected.</p>	<p>26. PP10: What is the risk that in practice there is no due diligence on applicants' claims regarding their capacity and financial resources?</p> <p>27. PP11: What is the risk that there is no due diligence on applicants' integrity, such as past lawful conduct and compliance?</p>
<p>Environmental Impact Assessment License Map (Practice): The EIA documents are public documents and can be accessed at the NEMA offices or website (for some of the projects) however the criteria that is used to arrive at these reports is not known by the public and many stakeholders. This opaqueness can create a space for corruption to thrive in the environmental assessment process.</p>	<p>28. RA6: What is the risk that criteria for EIAs will not be publicly knowable?</p>
<p>Institutional & Administrative Architecture Factor: Monitoring has not been effective on rights/permits held by mining companies. For instance, companies have not been well monitored to ensure adherence to the environmental management plans they outlined in the EIAs at the formative stage of licensing. This situation can cause serious environmental effects with a bearing on communities' welfare.</p>	<p>29. RA14: What is the risk that there will be inadequate monitoring of license and permit holders and their obligations?</p>
<p>Institutional & Administrative Architecture Factor: There have been very few cases reported of companies being sanctioned for non-compliance to set terms and conditions and this is attributed to the culture that has been instilled at these licensing agencies. It is also indicative of the likelihood of bribery occurring – in cash and kind - so as to avert possible sanctions. Failure to sanction offenders normally emboldens them creating a culture of impunity whose effects are wide-reaching for the sector.</p>	<p>30. RA15: When reporting requirements, such as for exploration or production data, have been deliberately breached, e.g. false data have been published, what is the risk that no action will be taken in response?</p> <p>31. RL5: What is the risk the license and permit-holders who breach their conditions and contracts can escape prosecution or other sanctions by engaging in corrupt behavior?</p>
<p>Social Factor: The culture in Kenya is one where everyone minds their own business unless the offence directly affects them. Furthermore, whistleblowing has been illustrated to be a dangerous endeavour because some people have been killed trying to blow the whistle on discovered criminal/civil offence. This fear is prevalent in various sectors of the economy and it prevents the country from unearthing some of the serious economic crimes that hemorrhage the country of its due resources.</p>	<p>32. RL6: What is the risk that people with knowledge of corruption in the awards process will not make a report?</p> <p>33. RL7: What is the risk that whistleblowers will not be legally protected?</p>

Table 5: Vulnerabilities and Corruption Risks

The process maps and context analysis led to the identification of 33 corruption risks, but these were narrowed down to 18 risks. The 18 risks were selected for further assessment as the information gathered provided overwhelming supporting evidence that informed their analysis. Further, their impact was considered to be relatively high.

Chapter Five

Results and Discussions on the Results

5.1. Results

The corruption vulnerabilities identified within the context and award maps gave rise to a number of corruption risks as referenced from the MACRA Tool.⁷⁴ These risks have two components used to analyse their severity: This is 'likelihood' of the risk occurring and its 'impact' if it occurs, as outlined in the risk assessment tables on Annex 3. Both components (Likelihood and Impact) were scored separately for each corruption risk (Scores of between 1 and 5). The explanations on the rationale used to define the varying scores for the likelihood and the impact of each risk, is illustrated in the tables below:

Defining Likelihood		
1: Very Unlikely	A rare or unrealistic chance of happening.	0-10%
2: Unlikely	Has a doubtful or improbable chance of happening.	10-30%
3: Moderately Likely	Has a reasonable chance of happening.	30-60%
4: Likely	Has a high chance of happening.	60-90%
5: Very Likely	Will almost certainly happen / is expected to occur.	90-100%

Defining Impact			
	Operations	Personnel	Assets
1: Negligible	Minor disruption	No injuries	No damage
2: Minor	Limited delays	Some minor injuries	Possible harm
3: Moderate	Delays	Non-life threatening	Some loss
4: Severe	Severe disruption	Severe injuries	Significant loss
5: Critical	Cancellation \ Stopped	Death and major injuries	Major or total loss

Following the score definition of both the likelihood and the impact on each risks, a product of the two scores i.e. 'Likelihood x Impact' gave the final score for each risk. This final score determines the gravity of the corruption risk and will subsequently give a cue on the risks to be prioritised for interventions.

Scoring of the risks was initially done by an advisory group. Subsequently, a total of four validation workshops were held in the 3 Counties and at the national level where key stakeholders representing Civil Society Organizations, Government Departments, Communities, Mining Companies and Academia reviewed the identified risks and offered their scores by giving clear justifications to the scores. It is notable that, there were certain risks (as seen in annex 4) which were not conclusively scored at the county level validation workshops since the respondents (community and county representatives) could not give scores from an informed point of view. The research therefore relied on the national level validators and the advisory group⁷⁵ to score these risks. The mean from the total final scores against each risk from all validation workshops was derived as the overall final score against that particular risk.

⁷⁴ MACRA Tool contains a list of indexed and pre-determined risks based on data from related research in different countries. This assessment is designed to select from this extensive list, and to match those corruption risks that best describe one's country context.

⁷⁵ The advisory group comprised of the National Researcher, TI-Kenya Research Officer and the, Project coordinator

The total number and variation of participants during the validation workshops is as illustrated in the table below:

	Government	Mining Companies	CSOs	Community	Academia	Totals
Kitui	6	0	4	15	0	25
Kwale	2	1	9	7	1	20
Taita taveta	8	0	4	6	0	18
Nairobi	5	1	15	0	1	22

Table 6: Validation workshops' participants

Thereafter, the advisory group analysed the feedback from the validation workshops and rationalized the scores for the identified risks.

Risk Assessment Scores

Table 7 below gives a summary of the scores for the identified corruption risks

RISK	LIKELIHOOD SCORE: IMPACT SCORE	FINAL RISK SCORE
Risk CF3	Likelihood = 4; Impact = 4	4 x 4 = 16
Risk CF4	Likelihood = 5; Impact = 5	5 x 5 = 25
Risk PD22	Likelihood = 4; Impact = 5	4 x 5 = 20
Risk PD3	Likelihood = 4; Impact = 5	4 x 5 = 20
Risk PD4	Likelihood = 4; Impact = 5	4 x 5 = 20
Risk PD5	Likelihood = 3; Impact = 4	3 x 4 = 12
Risk PD6	Likelihood = 3; Impact = 4	3 x 4 = 12
Risk PD8	Likelihood = 4; Impact = 5	4 x 5 = 20
Risk PD36	Likelihood = 4; Impact = 4	4 x 4 = 16
Risk PP6	Likelihood = 4; Impact = 5	4 x 5 = 20
Risk PD16	Likelihood = 4; Impact = 5	4 x 5 = 20
Risk PP7	Likelihood = 4; Impact = 4	4 x 4 = 16
Risk PP9	Likelihood = 5; Impact = 5	5 x 5 = 25
Risk PP10	Likelihood = 4; Impact = 5	4 x 5 = 20
Risk PP11	Likelihood = 4; Impact = 5	4 x 5 = 20
Risk RA6	Likelihood = 4; Impact = 4	4 x 4 = 16
Risk RL6	Likelihood = 5; Impact = 5	5 x 5 = 25
Risk RL7	Likelihood = 5; Impact = 5	5 x 5 = 25

Table 7: Risk Assessment Scores

Risk Matrix

The risk matrix provides the total score of the likelihood and impact of the identified risks. Plotting the score on the risk matrix assists in determining the level of importance to support a viable intervention in line with the impact of the risk. The assessment has classified the impacts as insignificant, minor, moderate, major and catastrophic. The scores reveal that all the identified corruption risks have a likelihood of occurring and could pose major and catastrophic impact as shown in table 8 below:

Likelihood	5 Almost Certain	5	10	15	20	25
	4 Likely	4	8	12	16	20
	3 Possible	3	6	9	12	15
	2 Unlikely	2	4	6	8	10
	1 Almost impossible	1	2	3	4	5
		1 Insignificant	2 Minor	3 Moderate	4 Major	5 Catastrophic
		Impact				
						<ul style="list-style-type: none"> CF.4 RL.6 PP.9 RL.7
						<ul style="list-style-type: none"> PD. 3 PP.11 PD.4 PP.6 PD.8 PP.10 PD.16 PD.22
						<ul style="list-style-type: none"> CF.3 PD.36 PP.7 RA.6
						<ul style="list-style-type: none"> PD. 5 PD.6

Table 8: Risk Matrix

5.2. Discussion of Results

The assessment identified Eighteen (18) risks out of the 33 risks with varying ‘likelihood X (multiplied by) impact’ scores. The 18 risks were identified based on evidence gathered to support their analysis.

This section will focus on the risks with a high likelihood of occurrence as plotted in the red zone. These have been further clustered into 3 main groups based on their severity as per the scores.

The clusters are as follows:

1. Risks that are catastrophic and almost certain to occur
2. Risks that are catastrophic and likely to occur
3. Major risks that are likely to occur.

The table below shows the descending order of the risks;

CODE	RISK	Score
Risk CF4	What is the risk that there will be corrupt speculation around land subject to a mining permit application, such as by officials working with collaborators to change the status of the land to extract payments out of the licence-holder?	25
Risk PP9	What is the risk there is no verification of the accuracy or truthfulness of environmental impact assessment (EIA) reports?	25
Risk RL6	What is the risk that people with knowledge of corruption in the awards process will not make a report?	25
Risk RL7	What is the risk that whistleblowers will not be legally protected?	25
Risk PD3	What is the risk that the steps of an award process will not be publicly knowable?	20
Risk PD4	What is the risk that criteria for awarding licenses etc will not be publicly knowable?	20
Risk PD8	Assuming consultation with communities or landholders is required, what is the risk that the legal framework for consultation is not publicly knowable?	20
Risk PD22	What is the risk of external interference in the award agencies' awarding of licenses etc?	20
Risk PD16	Assuming consultation with communities or landholders is required, what is the risk that negotiations for landholder or community agreements can be manipulated?	20
Risk PP6	Assuming consultation with affected communities is required, what is the risk that their free, prior, informed consent will be ignored as a result of corrupt practices?	20
Risk PP10	What is the risk that in practice there is no due diligence on applicants' claims regarding their capacity and financial resources?	20
Risk PP11	What is the risk that there is no due diligence on applicants' integrity, such as past lawful conduct and compliance?	20
Risk CF3	What is the risk that surface rights in areas being opened for mining are not clear in law?	16
Risk PP7	What is the risk that community leaders negotiating with a mining company will not represent community members' interests?	16
Risk RA6	What is the risk that criteria for EIAs will not be publicly knowable?	16
Risk PD36	What is the risk that details of licences etc that have been awarded will not be publicly known?	16
Risk PD5	What is the risk that salaries of cadastre (or equivalent) agency staff are less than a living wage?	12
Risk PD6	What is the risk that cadastre agency officials will engage in secondary employment with mining companies?	12

Table 9: Corruption risks (in descending score order)

The ORANGE zone contains two risks which are generally considered likely to occur and with significant impact once they occur. Risk PD 5 and PD 6 both concern the financial welfare of the licensing agencies officials, especially on their remuneration and the possibility of seeking supplementary sources of income within the mining sector. The study did not find a conclusive position about the wages due to lack of access to the Cadastre agency officials at the Ministry of Mining. However, the other government agencies who participated in the validation workshops, indicated that the decision to engage in corruption is not a systemic issue, rather, one that varies depending on each officer.

5.2.1. Catastrophic and Almost Certain to Occur

Four corruption risks were identified under this category as discussed below;

a) Risk CF4-(What is the risk that there will be corrupt speculation around land subject to a mining permit application, such as by officials working with collaborators to change the status of the land to extract payments out of the license-holder?)

Prior to mining operations some land speculators with insider information normally purchase lands adjacent to or within a mining right. Thereafter, these land dealers turn over the land to the mining company or a mining associated enterprises at a good profit thereby denying the original owners the financial windfall.⁷⁶ Eighty percent (80%) of the participants at the 4 validation workshops confirmed that land speculation was prevalent in many areas of the country and not only in the mining sector as it cuts across different sectors. Communities in Kwale County indicated that land speculators had already bought large tracts of land at Mrima Hill because of the huge deposits of rare earth minerals that were discovered on the hill. Land speculation was also reported in Voi in Taita Taveta County where new mineral deposits had been discovered. This therefore indicates that the problem is highly prevalent especially when some individuals gain access to insider information that gives them an unfair advantage. There were indications that legislating against land speculation was difficult since the practice in itself was not illegal therefore efforts to curtail this practice would only focus on preventing information leakages from ministry officials.

b) Risk PP9 (What is the risk there is no verification of the accuracy or truthfulness of environmental impact assessment (EIA) reports?)

The above risk addresses the issue relating to lack of verification of the accuracy and truthfulness of EIA reports. The assessment established that the EIA reports are not subjected to thorough verification as such negative environmental impacts are most likely to occur around mining operations.

The discussions held with the key informants revealed that EIA experts were not properly monitored a fact that led to some of them carrying out a desktop evaluation instead of gathering data in the area under concern. Officials from NEMA on the other hand pointed out that it was not possible to carry out quality validations of all the EIA reports due to lack of capacity and financial constraints. It was further established that the lead agencies tasked with evaluating details of EIAs sometimes fail to provide their input due to insufficient capacity and heavy workloads. Inadequate verification of the EIA process often leads to projects obtaining the environmental licences despite the potential serious implications they may have on the environment and communities. As a result, communities that are geographically situated around the projects may bear the brunt of negative environmental impacts when they occur. This risk is therefore categorized as catastrophic and requires intervention.

c) Risks RL6 – (What is the risk that people with knowledge of corruption in the awards process will not make a report?)

The above risk seeks to address reporting of corruption incidents that occur within the award process by individuals who are privy to such information. The findings revealed that most individuals fail to report the cases due to lack of confidence in the authorities that are mandated to handle corruption related cases.

⁷⁶ Key informant interviews: Deputy governor, Taita Taveta County (17-02-2017), representative of Kenya Land Alliance (25-03-2017)

Further, respondents from the validation forums across the three counties cited lack of awareness on the existing reporting mechanisms as a hindrance to making of such reports. Discussions with representatives from the Ministry of mining officials indicated that any incidents that occur can be reported to the Ministry, Ombudsman, Police or any relevant body that has the mandate to handle such complaints.⁷⁷ It was however established that the Ministry lacked a comprehensive complaints handling mechanisms to promote effective handling of complaints.

d) Risk RL7 (What is the risk that whistleblowers will not be legally protected?)

The above risk was identified as critical due to the existence of a weak legal framework to promote whistleblowers in Kenya. In overall, the assessment established that the country lacks a whistleblower legal and institutional framework although efforts are underway to develop a Whistleblower law which is currently in form of a draft Whistleblower Bill, 2017 and additional steps are being undertaken to develop a Whistleblower Policy for the country. These efforts will directly impact on whistleblowing concerns that may arise in the mining sector.

According to a one of the key informants, whistleblowing in Kenya has far reaching consequences including loss of life for exposing corruption practices in a certain organization or public office.⁷⁸ This was corroborated by participants during a validation forum held in Kitui County. It emerged that incidents of loss of life by individuals have been experienced as such communities opt to remain silent on corruption related cases that emerge in the area due to existence of weak protection mechanisms. It was further established that people are unaware of protected disclosure mechanisms and that there is lack of Protector Disclosure Coordinators within the licensing agencies to support and protect staff in making corruption disclosures.⁷⁹

5.2.2 Risks that are Catastrophic and Likely to Occur

A total of eight corruption risks were identified under this class as discussed below;

a) Risk PD3- (What is the risk that the steps of an award process will not be publicly knowable?) and Risk PD4 (What is the risk that criteria for awarding licences e.t.c. will not be publicly knowable?)

The above risk focuses on knowledge on the award processes by the public. Knowability of the award process is relevant to all the stakeholders at all levels including the mining communities. It relates to the capacity to understand the award process. The assessment established that despite the promotion of the right to access to information under Article 35 of the Constitution 2010 and the enactment of Access to Information Act, 2016 the sector was still witnessing a challenge in accessing information.⁸⁰ It further revealed that there exists lack of sufficient regulations to compel the licencing departments to proactively provide information in a form that is user-friendly and understandable by the wider public.⁸¹ Additionally, the secondary information gathered pointed to the high level of secrecy within the mining sector.⁸² The levels of secrecy have a great impact on information sharing of the processes.

⁷⁷ Feedback received from a meeting held with representatives from the Ministry of Mining on 13-9-2017

⁷⁸ An interview with a representative from Kenya National Commission on Human Rights

⁷⁹ A key informant interview held with a representative of Action aid Kenya on 21-03-2017

⁸⁰ Feedback received from participants at a validation forum held in Nairobi on 30th May 2017

⁸¹ Expert interview, Executive Director, Tax Justice Network Africa (24-02-2017)

⁸² News article, A. Jamah, (19-10-2013), [Stakeholders blame secrecy clause to graft in Kenya mining sector] <http://standardmedia.co.ke/mobile/article/2000095810/>



- b) *Risk PD8 (Assuming consultation with communities or landholders is required, what is the risk that the legal framework for consultation is not publicly knowable?), Risk PD16 (Assuming consultation with communities or landholders is required, what is the risk that negotiations for landholder or community agreements can be manipulated?) and Risk PP6 (Assuming consultation with affected communities is required, what is the risk that their free, prior, informed consent will be ignored as a result of corrupt practices?)*

The assessment revealed that most communities are not aware about the legal framework for consultations. Feedback received from the focus group discussions held in the three counties revealed that communities, who are central to these consultations lacked information on the existing frameworks. Further information received from the mining companies admitted that they conducted such consultations using their internal frameworks due to lack of understanding of the consultation frameworks. Additionally, participants at the national validation forum emphasized that the Mining Act is silent on communication between the mining companies and the communities and that there was lack of strong inbuilt mechanisms put in place by the Ministry of Mining to educate the communities on such frameworks.

The lack of proper consultation frameworks is a driver to manipulation of communities. The assessment established that lack of regulations and guidelines on landholder/ community engagement has enabled powerbrokers to thrive and to lead the process of entering into agreements between companies and communities without taking adequate care of community interests.⁸³ Such manipulation has led to rising of many land related complaints from the mining communities across the counties. The emergence of these complaints is attributed to poor consultations with the mining companies.⁸⁴ The assessment further revealed lack of a legal framework to guide Free, Prior and Informed Consent (FPIC) within Kenya. Information gathered from one of the key informants indicated that the government has not fully taken the principles of FPIC into consideration when introducing investors to the communities.⁸⁵ Additionally, most of the communities do not understand their right to own land and property and the right to be consulted to aid giving of consent. The non-adherence to FPIC leads to the skipping of a crucial step in the permitting process. A transparent consultation process would promote transparency and accountability as it provides an opportunity to scrutinise licences, consultation and potential negotiation processes. It is however notable that the consultation process can also encourage corruption, as companies could be incentivised to bribe community leaders or government officials to bypass consultation requirements.⁸⁶

- c) *Risk PP10 (What is the risk that in practice there is no due diligence on applicants' claims regarding their capacity and financial resources?) and Risk PP11 (What is the risk that there is no due diligence on applicants' integrity, such as past lawful conduct and compliance?)*

The two risks focus on the lack of due diligence in the licence application processes. The old licensing framework failed to adequately capture due diligence frameworks.

⁸³ Feedback from focus groups discussion in Kitui, Kwale and Taita Taveta counties held between January and February of 2017

⁸⁴ Norwegian Church Aid publication: Local Communities in Kenya's Extractive Sector, From Paternalism to Partnership.)

⁸⁵ Expert interview, Kenya Land Alliance representative, (25-03-2017). [

⁸⁶ <http://pubs.iied.org/pdfs/16530IIED.pdf>

This was evidenced by the high number of companies that were found to have very limited financial and technical capability by a taskforce formed by the Ministry of Mining to examine the state of mineral licensing in Kenya.⁸⁷ According to a former Ministry of Mining officer, due diligence on aspects such as applicants' integrity and past lawful conduct was rarely considered leading to acquisition of licences by corrupt individuals and companies.⁸⁸ The Mining Act, 2016 and the accompanying draft regulations have not provided clear guidelines on carrying out due diligence on all licence applicants, therefore, the risk that due diligence will not be exercised will still remain a challenge until the provisions are incorporated in the legal framework. The assessment however established that the Ministry of Mining ensures due diligence through the use of the Cadastre portal which has eliminated human interactions between the Clients and the staff. Further, the Ministry has recruited additional staff members who will be deployed to the regions in order to enhance its presence and response to different stakeholders at different levels. The bearing of these risks could promote introduction of mining companies with questionable backgrounds that may have negative influence on the fabric of the sector. It is therefore useful to promote measures that will ensure that only companies that uphold integrity secure mining rights.

d) Risk PD22 (What is the risk of external interference in the Award Agencies' awarding of licenses etc?)

The above risk focuses on external interference with the agencies that are charged with the mandate to award various licenses. The assessment established that there exists interference with the agencies that award such licenses. The respondents stated that the interference emanates from politicians and powerful individuals who take advantage of the weak licencing systems.⁸⁹ It is however notable that the licencing systems is undergoing review hence the introduction of the Cadastre system. According to a key informant representing Adam Smith International,⁹⁰ there was greater need in instilling integrity ideals within the system to avoid compromising the new system.

1.1.1. Major Risks and Likely to Occur

Four corruption risks were identified under this category as discussed below;

a) Risk CF3 (What is the risk that surface rights in areas being opened for mining are not clear in law?)

The above risk explores the lack of clarity on surface rights for areas being opened up for mining. The surface rights include any use of land that is subject to a mineral right to graze livestock or to cultivate the land to the extent that such action does not interfere with the relevant prospecting or mining operation and does not by virtue of those operations cause danger or hazards to livestock or crops.⁹¹ The assessment established that the Mining Act, 2016 caters for provisions that regulate surface rights.⁹² The Act provides for principles of compensation when the surface rights are violated and further provides for steps to be taken in resolving a dispute that may arise as a result of issuance of a mineral right.

⁸⁷ http://www.the-star.co.ke/news/2014/01/30/nyaoga-audit-exposes-rot-in-mining-sector-licensing_c888807

⁸⁸ Key informant interview with a former Ministry of Mining official conducted on 15th February 2017.

⁸⁹ Feedback received from Key informants from the National Land Commission, NEMA and participants from the validation forums in three counties

⁹⁰ Interview held on 20th February 2017

⁹¹ S 152 of the Mining Act, 2016

⁹² Part IX of the Mining Act, 2016

The findings revealed that these rights have sometimes been infringed upon during the licensing process by prioritization of the mining investor over community surface rights. Feedback received from the respondents in the three counties revealed that concerns of the communities are not well articulated during the consultation processes with the companies e.g. two communities in Kwale County complained about contaminated water streams that they could no longer use and stated that they were aware of the effects of the mining operations on the water bodies prior to developing the mine but proper mitigation measures were not put in place. Despite the surface rights being protected by the law, it emerged that there was low awareness on such provisions by the community members resulting into some companies encroaching on land that is adjacent to their mining operations without due process and compensation of the land owners/occupiers. Therefore, despite, the existence and articulation of these surface rights in the law, the communities argued that they are yet to see the absolute effectiveness and protection of their rights that comes with proper implementation of the law.

b) Risk PP7 (What is the risk that community leaders negotiating with a mining company will not represent community members' interests?)

The above risk explores lack of adequate representation of community member's interests by community leaders. The assessment established that the communities were represented by liaison committees which failed to adequately represent their interests in a number of cases across the three targeted counties. The findings revealed that the elected liaison committee members in Kitui County resorted to advancing unsanctioned agendas while in Kwale County, the communities believed that their selected representatives had been compromised by the mining company to minimize community agitation. In Taita Taveta County on the other hand, selection of the representatives was allegedly biased to favour one village over the other despite the disadvantaged village being the closest to the mine. Majority of respondents drawn from the communities stated that most of the community leaders did not fully represent their interest. This emerged as a trend in the three counties and the risk may continue affecting the communities if the existing framework for negotiation is not strengthened.

c) Risk PD36 (What is the risk that details of licences etc. that have been awarded will not be publicly known?)

The Kenyan legal framework strongly promotes access to information by citizens. This is enshrined under Article 35 of the Constitution of Kenya, 2010 which recognizes access to information as a fundamental right. Further, the country has enacted an Access to information Act, 2016 whose object and purpose is among other things, to provide a framework for public entities and private bodies to proactively disclose information that they hold and to provide information on request in line with the constitutional principles.⁹³ S 20 (1) (i) of the Mining Act, 2016 on the other hand, mandates the Director of Mines to facilitate access to information by the public, subject to any confidentiality restrictions. Further the upgraded online Cadastre system will among other things provide an online portal for interested and affected parties to view license applications in their area during a set time window. It will also allow parties to raise queries and give feedbacks.⁹⁴

⁹³ S 3 (b) of the Access to Information Act, 2016

⁹⁴ Information on the Upgrade of the online transactional mining cadastre licensing portal accessed on 18th June 2017 at <http://www.mining.go.ke/?p=364>

Despite the existing access to information legal framework, participants at the validation forums and key informants across the three counties pointed out the need for the government to facilitate access to information regarding the various licensing processes. Additionally, the respondents held the view that both the national government and the county governments should educate the citizens and communities on the various mining operations that may take place in their communities and the entire licensing process so as to equip them with information to enable them negotiate for better terms with investors. It is therefore imperative that the details of the licences would be publicly known if there is compliance with the above provisions and the members of the public empowered to request for such information. Most of the respondents from the Civil Society Organizations indicated that the above risk would persist due to lack of clear regulations on scope and format of licence details disclosure.

d) Risk RA6 (What is the risk that criteria for EIAs will not be publicly knowable?)

The above risk is exploring the public knowability of the criteria for EIAs. The EIA is a prerequisite to issuance of a mining license. The process should be consultative and it involves a number of stakeholders. These stakeholders are expected to understand the process and to be aware of the criteria used to make environmental evaluations of projects. However, following the focus group discussions held with the communities in Kitui, Kwale and Taita Taveta, this assessment established that the EIA process is complex and detailed and as such only comprehensively understood by NEMA (which is the government agency mandated with oversight of this process) and the experts certified by NEMA to conduct EIAs. The general public has minimal or no knowledge at all on the EIA process and the criteria involved, hence lack the necessary, skill, knowledge and capacity to constructively critique the process. Although NEMA has begun publishing the EIA reports there is limited communication to the public on the criteria that is used to evaluate the reports and the guiding principles for approval and disallowing of mining projects. Community representatives in Kwale County indicated that most of them did not understand the EIA process conducted by one of the mining companies as such, they were unable to ask meaningful questions during this process.

Chapter 6

Conclusion and Recommendations from the Assessment

This assessment established a number of gaps based on the risks identified. These gaps may have great impact on the effective and efficient operation of the Mining sector. It was established that the risks may be as a result of and not limited to the following;

1. Lack of awareness on the laws and regulations that govern the mining sector in Kenya by the key stakeholders such as the citizens, mining companies, Civil Society Organizations and government agencies that have a direct mandate in governance of the sector
2. Lack of awareness amongst affected communities on available mechanisms for public participation during the licensing process which contributes to manipulation of such communities by the mining companies
3. Capacity gaps within institutions that are charged with the mandate to govern the sector which affects implementation of the laid down procedures on the licensing and permitting process specifically for the EIAs and land use
4. Lack of a proper legal framework to promote whistleblowing on corruption incidents that occur within the award process
5. Political interference due to vested interests in some of the mining companies
6. Delay in gazetement of draft rules and regulations to support implementation of the Mining Act, 2016
7. Delay in constituting the Mineral Rights Board which is supposed to make recommendations to the Cabinet Secretary on the issuance of licences and permits
8. The online mining cadastre portal which is the ministry's repository for all information regarding licensing processes was under reconstruction to conform with the Mining Act, 2016 during the time of the assessment hence posing a challenge on accessing information on pending applications and licences issued.

TI-Kenya therefore recommends various interventions to the relevant stakeholders as follows;

Ministry of Mining

1. Fast-track gazetement of all the necessary Mining Regulations and Guidelines such as the Mining (Royalty) Regulations to support effective implementation of the Mining Act 2016
2. Sensitize companies, affected communities and all the other relevant stakeholders on the use of the newly re-configured and upgraded cadastre system 2016 to improve their knowledge on the online licensing system and to achieve the objectives of the Mining Act, 2016
3. Simplify laid down procedures and steps involved in acquisition of mineral rights for better understanding of the processes especially by affected communities
4. Set up mechanisms that will promote public participation and information sharing between the ministry and all the relevant stakeholders in line with Constitutional

provisions, Access to Information Act and all other relevant statutes and guidelines for greater transparency of the licensing process

5. Set up a comprehensive internal complaints handling mechanism to encourage reporting of anomalies that are experienced during the licencing process
6. Establish a whistle-blower mechanism to encourage most stakeholders with critical information to confidently submit complaints to the ministry for action
7. Ensure due diligence is carried out during the evaluation of licence applications with an aim of vetting all licence applicants. This would assist in filtering out applicants with integrity or other questionable issues

National Environmental Management Authority

9. Create awareness amongst the affected communities on the Environmental Impact Assessment process to promote their meaningful participation in the process
10. Simplify procedures and steps involved in conducting environmental impact assessments for ease of understanding by the relevant stakeholders especially the affected communities
11. Proactively follow up on the EIA process to ensure accuracy of EIA reports and setting up of appropriate mitigation measures
12. Proactively publish the EIA reports to promote access to information on the impacts of the proposed projects
13. Develop more stringent guidelines to govern the conduct of EIA experts to curb production of manipulated EIA reports
14. Establish effective terms of engagement with the other lead agencies involved in the assessment of EIA findings to ensure quality of the assessments
15. Advocate for improved budgetary allocation to support proper assessment and monitoring activities by the Authority

Mining Companies

16. Set up proper mechanisms that would promote incorporation of views from the affected communities in the EIA processes
17. Flag out any anomalies observed during the licence application process by licencing officials or their peers to create a culture of transparency in the award process
18. Put up Internal policies to promote transparency and engagement with communities based on best practices such as the Informed Free Prior Consent Standards
19. Adopt integrity management initiatives within the organization in line with legal frameworks available locally and at country of origin
20. Consider joining private sector initiatives that promote doing business with integrity such as the UN Global Compact initiative



Civil Society Organizations

21. To create awareness on the licencing processes amongst the affected communities as this will promote their participation at different stages
22. To monitor operations of the Minerals Rights Board to ensure their compliance with the laid down procedures in making recommendations for issuance of licences
23. Support the affected communities in seeking redress for violations that may arise as a result of lack of adherence to laid down procedures in awarding various licences
24. Develop a peer learning framework to keep up with the developments in the sector as this would ensure informed advocacy initiatives regarding granting of mineral rights
25. Develop sustainable monitoring mechanisms to ensure that companies and relevant government departments involved in the award processes remain compliant with the law

Affected Communities

26. To proactively seek information on the different mineral licensing processes to effectively engage with mining companies and government departments
27. To ensure adequate representation at all forums where deliberations on mineral licensing are taking place
28. To proactively identify and report all corruption related incidents that may result into manipulation of the licensing processes.

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Annexes

Annex 1: Minerals Occurrence in Kenya.

REGION	COUNTY	MINERALS
RIFT VALLEY	Kajiado	Soda Ash, Feldspar, Limestone Gypsum, Gemstones, Marble & Granite (dimension stone)
	Elgeyo Marakwet	Fluorspar
	Baringo	Gemstones (Baringo Ruby), Diatomite
	Nakuru	Diatomite
	Turkana	Gold, Gemstones, Gypsum
	West Pokot	Gold, Gemstones, Chromite
	Samburu	Gold, Gemstones, Manganese, Chromite, Vermiculite
	Narok (Trans Mara)	Gold
	Nandi (Kibigori)	Gold
	WESTERN	Kakamega
NYANZA	Siaya	Gold, Iron Ore
	Migori	Gold, Copper
	Homa Bay	Iron Ore, Gold
CENTRAL	Kiambu	Carbon Dioxide, Diatomite
	Machakos	Gypsum, Pozzolana,
	Kitui	Coal, Iron Ore, Copper, Gemstones, Limestone, Magnetite
	Makueni	Vermiculite, Gemstones
	Tharaka Nithi	Iron Ore, Gemstones
	Isiolo	Gemstones
	Marsabit	Gold, Gemstones, Manganese, Chromite
	COAST	Taita Taveta
	Kwale	Gemstones, Heavy Mineral sands (titanium minerals), Silica Sand, Rare Earth Elements, Niobium
	Kilifi	Titanium Minerals, Manganese, Barytes, Gypsum, Gemstones
	Tana River	Gypsum
NORTH EAST-ERN	Garissa	Gypsum
	Mandera	Gypsum

Source: Author's compilation from Ministry of Mining

Annex 2: Minerals and Distribution of Companies

Mineral	Mining Company
Titanium	Base Titanium Kenya
Gold	ASM, Africa Barrick Gold, Acacia Mining Plc
Soda Ash	Tata Chemicals
Limestone	Athi River Mining & other cement companies
Iron Ore	Wanjala Mining Company



Flourspar	Flourspar Mining Company
Ruby	Rockland Kenya
Diatomite	Africa Diatomite Industries
Carbondioxide	Carbacid Investments
Gypsum	Delta Mining Company, Kenjoro Enterprises
Copper	Macalder Gold and Copper Mines

Source: Author's compilation from Ministry of Mining

Annex 3: Risk Assessment Tables

<p>What is the risk that surface rights in areas being opened for mining are not clear in law? Uncertainty around surface rights, such as for pasture and water, creates incentives and opportunities for corruption around which rights have precedence over other rights.</p>		<p>Code</p> <p>CF3</p>
<p>Likelihood</p> <p>Score</p> <p>4 / 5</p>	<p>Evidence to support assessed likelihood</p> <ol style="list-style-type: none"> Some mining companies have formed the habit of encroaching on lands adjacent to their mining operations without due process and compensation of the land owners/occupiers. This is done because the land is deemed to be of few uses and thereby not very important to the communities nearby. <ul style="list-style-type: none"> Source: (a) Interview with two communities in two counties (Kitui and Taita Taveta Counties, (14-01-2017 & 17 -02-2017 respectfully) (b) Expert interview with Kenya Land Alliance representative, (25-03-2017). Land grabbing in Kenya is a common practice and in most of the cases the victims do not get justice or any satisfactory redress. <ul style="list-style-type: none"> Source 1: A publication chronicling land grabbing in Kenya and Mozambique http://www.goo.gl/fnxQB0 Source 2: LDGI Survey: Status of Public Land Management in Kenya http://www.goo.gl/AkRV4P 	
<p>Impact</p> <p>Score</p> <p>4 / 5</p>	<p>Evidence to support assessed impact</p> <ol style="list-style-type: none"> Several cases involving land disputes, land grabbing and land access. Moreover, most of these cases are protracted – sometimes into years – and this denies most victims quick justice. (search on kenyalaw.org.). <ul style="list-style-type: none"> Source: http://kenyalaw.org/caselaw/cases Communities whose land rights are affected and disregarded end up losing faith in the government institutions and would resort to alternative avenues to seek redress. These alternative avenues are sometimes catastrophic to all parties involved such as violence. <ul style="list-style-type: none"> Source 1: An example from the oil sector in Kenya on surface rights of communities https://goo.gl/7H3aAs Source 2: Kenya Human Rights Commission, Study Report : Benefits Sharing on Extractive Natural Resources with Society in Kenya, (14-03-2017) 	
	<ol style="list-style-type: none"> Communities whose land rights are affected and disregarded end up losing faith in the government institutions and would resort to alternative avenues to seek redress. These alternative avenues are sometimes catastrophic to all parties involved such as violence. <ul style="list-style-type: none"> Source 2: Expert Interview with a Kenya Land Alliance representative, (25-03-2017). 	

<p>3. Breach of constitutional provisions when surface rights are unfairly granted to mining companies.</p> <ul style="list-style-type: none"> Source: <i>Both Ends, Action Aid Case Summary</i>: http://goo.gl/jWdQmT
<p>4. The Community Land Act 2016 has provisions to protect the rights of communities who inhabit and utilize community land (which is where most mining operations take place). This is expected to reduce cases of land grabbing, especially when guidelines and regulations for the Land acts are enacted. Counties are also crafting their own citizen participation frameworks.</p> <ul style="list-style-type: none"> Source: http://goo.gl/YdukzG <p>Description of impact <i>Lack of clarity over surface rights is an easy incentive for companies to use bribery to get decisions made in their favor, especially in cases where they have land disputes. The local communities who rely on these lands may lose their use of the land for their livelihood because they are unable to successfully challenge the mining companies as the latter often has leverage, partly due to high financial abilities.</i></p> <p>Assessment</p> <p>Likelihood x Impact = 4 x 4 Total score: 16</p> <p>Risk level: Very high</p>

<p>What is the risk that there will be corrupt speculation around land subject to a mining permit application, such as by officials working with collaborators to change the status of the land to extract payments out of the license-holder? Sudden new developments on license areas, deliberate escalation of land rental fees or changes to relinquishment conditions following a mining permit application, can indicate corruption or create opportunities to corruptly manipulate the license-holder</p>	<p>Code</p> <p>CF4</p>
<p>Likelihood</p> <p>Score</p> <p>5 / 5</p>	<p>Evidence to support assessed likelihood</p> <ol style="list-style-type: none"> Land speculation has been observed in many places in the county and the motivation is always the same: to acquire land cheaply and to sell off at a profit in the short term. Land speculators have been found in the major economic zones/areas in Kenya <ul style="list-style-type: none"> Source 1: <i>Expert interviews: Deputy governor, Taita Taveta County (17-02-2017), representative of Kenya Land Alliance (25-03-2017)</i> Source 2: http://nairobibusinessmonthly.com/cover-story/kenyans-unyielding-appetite-for-property-is-anchored-on-quick-sand/ <p>2. Communities are often not informed on the impending exploration of mining near their communities because that information is not provided to them even during the exploration therefore it is easy for those who have the information -and these are mainly people connected to the cadastre officials or the minister – to unfairly make speculated land purchases.</p> <ul style="list-style-type: none"> Source: <i>Expert interview with a major limestone mining projects manager. [Reported that company policy does not allow them to disclose details of impending project to anyone including the locals at the community level.]</i> <p>3. High levels of poverty in some of these rural areas therefore many people in these communities would easily sell off their land at very low rates, sometimes way below the prevailing market rates.</p> <ul style="list-style-type: none"> Source: http://kenyanewsagency.go.ke/en/resolving-land-conflicts-in-kilifi-and-tana-river-counties/ [On increasing land speculation in the poor counties of Kilifi and Tana River].



<p>4. Slow implementation of land reforms effectively means that land speculators will continue with their practice. There is also no clear policy or guidelines on land speculation</p> <ul style="list-style-type: none"> Source: http://actionaid.org/activista/communities-urge-national-land-commission [Residents urging the National Land Commission to speed up implementation of land reforms]. 	
<p>Impact</p> <p>Score</p> <p>5 / 5</p>	<p>Evidence to support assessed impact</p> <p>1. Land buying by speculators often leads to massive disposal of land by locals in anticipation of financial windfalls. This leaves the community members with less land for their subsistence and other socio-economic activities and this impacts the wellbeing of the households of those involved.</p> <ul style="list-style-type: none"> Source 1: Expert interview with the Natural Resources Director at the National Land Commission (NLC): Source 2: Expert interview with the Kitui County Secretary for Mining and Environment. (12-01-2017)
<p>2. Value of land in the area in question goes up as the speculators create an artificial demand and this even locks out potential locals from the area from buying land as the price becomes prohibitive. Even the mining companies also find it hard to purchase the land as the prices defy their expectations and plans.</p> <ul style="list-style-type: none"> Source 1: News article [O. Guguyu, 'Land Prices rise again as excavators roar in Konza – but will it last? 20th December 2017 (online)]. http://qoo.gl/R5gXYN 	
<p>3. Sometimes the land speculators are the officials in the ministry of mining who have inside information about impending projects in certain areas. This practice eventually makes investors to lose faith in the ministry's licensing processes</p> <ul style="list-style-type: none"> Source: Interview Expert with a representative of Base Titanium Mining Company: (22-01-2017) 	
<p>4. There are plans to develop regulations that will control land speculation for major investments in the rural areas so as to cushion communities against exploiters.</p> <ul style="list-style-type: none"> Source: Expert interview: chairperson of the National Land Commission. (24-04-2017) 	
<p>Description of impact Land speculation, while it's not an illegal activity, can be misused by those in power or those with information. The speculators buy land prior to commencement of mining projects from the local community and eventually both the mining company and the community suffer: The mining companies are forced to buy/lease land expensively from these speculators while the community loses out having sold their land at usually very low rates to the speculators</p>	
<p>Assessment</p> <p>Likelihood x Impact = 5 x 5 Total score: 25</p> <p>Risk level: Very high</p>	

<p>What is the risk of external interference in the award agencies' awarding of licenses etc?</p> <p>External interference, such as by politicians, is sometimes built into the design of a process, e.g. when ministers are given rights to veto or to 'act in the interests of the state' on certain matters. However, unless such interference is guided by known criteria it creates opportunities for bias, undermines officials' decisions and may be motivated by bribery.</p>	<p>Code</p> <p>PD22</p>
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Likelihood	Evidence to support assessed likelihood
<p>Score</p> <p>4/5</p>	<p>1. Political interest in the mining industry in Kenya has been observed Some politicians own mines while others have partial interests in some mining companies.</p> <ul style="list-style-type: none"> Source 1: Expert interviews: Representative, Kenya National Commission on Human Rights, KNCHR (14-03-2017) Source 2: http://goo.gl/Q7TxTs/ [Canadian Junior miner caught up in corruption, murder scandal in Kenya]
	<p>2. Before the enactment of the Mining Act 2016, powerful individuals with interests in the mining industry often tried to subvert the license awards processes, and this is owing to their connections to powerful figures in government.</p> <ul style="list-style-type: none"> Source: Expert interview with a county environmental officer. (16-01-2017) [Reported that some powerful people and politicians come to the agency asking for their license applications to be fast-tracked even when they have not carried out the EIA process in the first place]. Source 2: Expert interview: Former Commissioner of Mines. (15-02-2017)
	<p>3. Known politicians have publicly supported or opposed projects and license issuance based on their interests in the projects. Those close to the mining investor would not oppose the project but instead would go out of their way to facilitate the acquisition of licenses to operate.</p> <ul style="list-style-type: none"> Source 1: News article, P. Muasya, (18-12-2016) https://www.standardmedia.co.ke/business/article/2000227177/political-intrigues-stall-coal-mining-project-in-kitui-county [Politics affecting project meaning they have influence to interfere with some aspects of the sector].
Impact	Evidence to support assessed impact
<p>Score</p> <p>5/5</p>	<p>1. When politicians try to represent company interests there is subsequent rent-seeking whereby powerful individuals hold these companies ransom.</p> <ul style="list-style-type: none"> Source 1: Newspaper opinion article, X.N. Iraki, (20-01-2009) [Welcome to Kenya, the Land of Rent Seekers] http://goo.gl/M078LA
	<p>2. Interference by powerful sources to influence the process can result in negative impacts to communities such as environmental degradation because of the absence of robust mitigative measures which a good EIA would have picked out.</p> <ul style="list-style-type: none"> Source 1: Expert interview with the EIA Lead at the National Environment Management Authority (NEMA): (20-02-2017)
	<p>3. External interference leads to a sector that comprises of questionable mining companies with questionable owners.</p> <ul style="list-style-type: none"> Source: Expert interview with a representative of Base Titanium Mining Company: (22-01-2017)
	<p>4. The new Mining Act 2016 and the new online cadastre system have been designed to minimize the influence of politicians and far reaching powerful figures in the licensing processes. On land access, the National Land Commission plans to sensitize the relevant departments so as to operationalize the laws which have robust provisions on licensing. The new act is expected to significantly prevent external interference in the award process.</p> <ul style="list-style-type: none"> Source: Expert interview: chairperson of the National Land Commission. (24-04-2017)



Description of impact Interference in the license awards process by powerful individuals or politicians is common in many countries and its impact on the licensing process is of a high magnitude. These individuals can easily defy the rule of law and get away with it. The entire licensing process is thus thrust into a practice of impunity and other license applicants are affected in the process. Vested interests easily get into the system and the rest of the value chain is predisposed to corruption

Assessment

Likelihood x Impact = 4 x 5

Total score: 20

Risk level: **Very high**

<p>What is the risk that the steps of an award process will not be publicly knowable? When all information is publicly knowable, especially if published in a flowchart or diagram, stakeholders know precisely what to expect and can hold officials to account if process is not followed.</p>	<p>Code</p>
<p>What is the risk that criteria for awarding licenses etc will not be public knowable? If criteria, including technical and financial criteria, for awarding licenses etc are not clear this creates opportunities for manipulation and interference in the process.</p>	<p>PD3 PD4</p>
<p>Likelihood</p>	<p>Evidence to support assessed likelihood</p>
<p>Score 4 / 5</p>	<p>1. The steps and criteria for awarding licenses in the mining sector in Kenya are not well understood because this information is not readily available</p> <ul style="list-style-type: none"> • Source: Focus Group Discussions in 6 communities between January and February 2017. No single person understood any step of the licensing processes for Land Access, Principal Mining License and Environmental License. • Source 2: A report by Article 19 (a global right to information advocacy organisation) titled [Kenya: Realising the Right to Information. 2014. Pg. 50]. This report shows the systemic lack of access to information in the public service space. https://www.article19.org/data/files/medialibrary/38388/Kenya-RTI-for-web.pdf
<p>2</p>	<p>There are no sufficient regulations to compel the licensing departments to provide information in the form that is understandable by the wider public. Even requests for information are sometimes denied.</p> <ul style="list-style-type: none"> • Source 1: Expert interview, Executive Director, Tax Justice Network Africa (24-02-2017) [Said that the sector is so secretive even for very basic information such as licensing criteria] • Source 2: News article, A. Jamah, (19-10-2013), [Stakeholders blame secrecy clause to graft in Kenya mining sector] http://standardmedia.co.ke/mobile/article/2000095810/ • Source 3: News editorial, (21-07-2017), [Kenya denies IMF access to secret mining agreements] http://www.businessdailyafrica.com/Kenya-denies-IMF-access-to-secret-mining-agreements/539546-1922406-xb9m6az/index.html
<p>3</p>	<p>Citizenry is unaware of their right to information</p> <ul style="list-style-type: none"> • Source 1: A report by Article 19 (a global right to information advocacy organisation) titled [Kenya: Realising the Right to Information. 2014. pg. 50]. This report shows the systemic lack of access to information in the public service space. https://www.article19.org/data/files/medialibrary/38388/Kenya-RTI-for-web.pdf

Impact	Evidence to support assessed impact
<i>Score</i> 5 / 5	<ol style="list-style-type: none"> Without the information flow, there is no basis for stakeholders and other observers to constructively critique the processes. <ul style="list-style-type: none"> Source : <i>Expert interview: Extractives Regional Manager, Adam Smith International, (04-04-2017) [Pointed out the apparent gap in information and how it permits rogue to be corrupt because the rest of the stakeholders have little understanding of the licensing process]</i>
	<ol style="list-style-type: none"> Lack of clear and straight forward process encourages the rise of middle men or brokers who in most times are the main conduits of corruption. <ul style="list-style-type: none"> Source: <i>Roundtable Discussion with two senior World Bank Leads on Extractives Sector in Nairobi, Kenya, (02-03-2017) March 2017.: [It was discussed that the mining sector is known globally for having 'front men' who broker on behalf of the mining companies and these 'front men' are also the main conveyors of corruption proceeds].</i>
	<ol style="list-style-type: none"> There is progressive acknowledgement of the knowledge gap and capacity is being built by different quarters such as the media where journalists are attending extractive sector training to upscale their aptitude in the sector and thereby to eventually provide oversight of the activities of the mining sector. The civil society is also learning more and building internal capacity to be able to critique the sector. <ul style="list-style-type: none"> Source: <i>The Tax Justice Network Africa and the University of Witwatersrand offering a course in Africa's Mineral Wealth Harnessing, in June 2017. This kind of trainings are becoming more common in the country. http://www.taxjusticeafrica.net/en/2017/04/africa-media-training-programme-2017-call-for-applications/</i>
	Description of impact: <i>The steps and criteria of the licensing processes need to be publicly knowable to create an enabling environment where constructive questions and feedback to the processes can be raised to aid in enhancing the effectiveness of these licensing and permitting processes as well as fight corruption in the mining sector that more often thrives due to the ignorance on the part of some stakeholders.</i>
	Assessment
	Likelihood x Impact = 4 x 5 Total score: 20
Risk level:	Very high

What is the risk that salaries of cadastre (or equivalent) agency staff are less than a living wage? Low salaries may be an incentive to demand bribes, speed money or gifts, especially if salaries of their private sector mining counterparts are far higher. Importantly, mining companies will be aware of any differences in pay and may target officials' grievances around salary.	Code PD5
What is the risk that cadastre agency officials will engage in Secondary employment with mining companies? Secondary employment with a mining company creates risks around the leaking of confidential information and making decisions in favor of the private employer.	PD6



Likelihood Score 3 / 5	Evidence to support assessed likelihood <ol style="list-style-type: none"> Some government workers earn salaries that are below those of their private sector counterparts. <ul style="list-style-type: none"> Source: Policy Brief No. 3/2015, The Kenya Institute for Public Policy Research and Analysis (KIPPRA), 2015. [Wage Disparities in the Formal Sectors: Policy Options for Kenya] http://www.kippira.or.ke/downloads/Wage%20disparities%20in%20the%20wage%20sectors.pdf
	<ol style="list-style-type: none"> A Kenya Institute for Public Policy Research and Analysis (KIPPRA) study in 2013 found that a substantial proportion of workers in the public sector (57.1%) expressed dissatisfaction in the remuneration levels <ul style="list-style-type: none"> Source: Research report, KIPPRA, February 2013. Pg. 78. http://www.src.go.ke/pdfdocuments/annual%20reports/wage-differentials-study-february-2013.pdf
	<ol style="list-style-type: none"> A Kenya Institute for Public Policy Research and Analysis (KIPPRA) & Salaries & Remuneration Commission study in 2013 found that a good proportion of employees in the public sector (76%) operate a second job in what is called ‘moonlighting’ so as to bolster their earnings. <ul style="list-style-type: none"> Source : Research report, KIPPRA, February 2013. Pg. 80. http://www.src.go.ke/pdfdocuments/annual%20reports/wage-differentials-study-february-2013.pdf
	<ol style="list-style-type: none"> There have been cases of licensing officers privately being engaged in short-term employment or consultancy by the private sector. Sometimes, staff in other departments of the ministry are the ones engaged in secondary employment by the mining companies. <ul style="list-style-type: none"> Source: Expert interview, former employee of the Ministry of Mining (23-03-2017) [Gave account of ministry employees who had professional relationships with mining companies and mining-affiliated companies]
Impact Score 4 / 5	Evidence to support assessed impact <ol style="list-style-type: none"> Employees who engage in secondary employment are easily compromised and can easily take bribes act in favor of a mining company. Or other ministry staff – who are not necessarily cadastre staff- could act as conduits for corruption. <ul style="list-style-type: none"> Source 1: Expert interview, Executive Director, Tax Justice Network Africa (24-02-2017) [Said that secondary employment of public sector workers needs to be carefully monitored and controlled]
	<ol style="list-style-type: none"> Workers who earn less than a living wage would ultimately seek alternative sources of income while still employed and this could be in form of bribes. Bribery in turn affects the integrity of the licensing process thus creating a bribery culture. <ul style="list-style-type: none"> Source: Policy Piece, J. De Haan, (16-06-2013), [Higher government wages may reduce corruption] http://voxeu.org/article/higher-government-wages-may-reduce-corruption Source 2: IMF Working Paper, C. Van Rijkeghem & B. Weder, June 1997. [Corruption and the Rate of Temptation: Do Low Wages in the Civil Service Cause Corruption?]
	<ol style="list-style-type: none"> There has been effort by Government to harmonize public sector wages however. This is expected to take effect from July 2017. However, there are a few challenges in the actualization of this as the total public wage bill of the country has hit unsustainable levels. <ul style="list-style-type: none"> Source: News article, L. Anami, (02-02-2017) https://www.standardmedia.co.ke/article/2001227992/civil-servants-get-salary-increase-bridging-gap-with-private-sector

Description of impact If employees of licensing agencies are involved in secondary employment with mining companies and their affiliates then we have conflict of interest situation. It becomes difficult for these government workers to make objective and transparent decisions when it comes to dealing with the mining company in areas like licensing and monitoring. This leads to a poorly regulated sector. At the same time, it becomes difficult to prevent this if these workers do not earn a decent salary from government.

Assessment

Likelihood x Impact = 3 x 4

Total score: 12

Risk level: **Moderate**

<p>Assuming consultation with communities or landholders is required, what is the risk that the legal framework for consultation is not publicly knowable? If the legal framework for consultation cannot be identified and understood, this creates opportunities for corruption around the obtaining of consent</p>		<p>Code PD8</p>
<p>Likelihood</p>	<p>Evidence to support assessed likelihood</p>	
<p>Score 4/5</p>	<p>1. There has been lack of a clear framework for consultation with communities and the same is not spelt out in the new laws and regulations.</p> <ul style="list-style-type: none"> Source: (a) Browse through the Mining Act 2016 and the Mining Regulations and Guidelines. http://mining.go.ke (b) Browse through the Environmental Management and Coordination (Amended) Act. 2015 https://goo.gl/VwtlvD (c) Browse through the Land Laws (Amendment) Act. 2016, https://goo.gl/ZwPTuN (d) Browse through the Community Land Act 2016 https://goo.gl/WTJW6L <p>2. There is lack of awareness on existence of standardized structures for consultations between the mining companies and the affected communities..</p> <ul style="list-style-type: none"> Source 1: Focus Group Discussions in 6 communities between January and February 2017. [All these communities admitted to have no knowledge of any structure program for community consultation.] Source 2: Community Perceptions Assessment report, Cordaid Kenya, August 2015. Pg. 30. https://www.cordaid.org/media/medialibrary/2015/09/Turkana_Baseline_Report_DEF-LR_Cordaid.pdf <p>3. Some companies tend to lean more towards engaging with communities who are less empowered (with regards to right to sufficient awareness and the concept of Free, Prior and Informed Concept (FPIC)</p> <ul style="list-style-type: none"> Source 1: Expert interview; Land and Livelihood Lead at ActionAid Kenya, (21-03-2017), [Asserted that mining companies find it easy and preferable to deal with communities that are not well informed of their rights]. Source2: http://www.ibtimes.com.au/kenya-official-denies-australian-company-tax-re-fund-claim-1449324 	
<p>Impact</p>	<p>Evidence to support assessed impact</p>	
<p>Score 5/5</p>	<p>1. Complaints regarding lack of proper consultations by investors have been raised by affected communities.</p> <ul style="list-style-type: none"> Source 1: Community Perceptions Assessment report, Cordaid Kenya, August 2015. Pg. 30. https://www.cordaid.org/media/medialibrary/2015/09/Turkana_Baseline_Report_DEF-LR_Cordaid.pdf 	



<p>2. There have been several reported complaints about land in many mining locales in the country and they all attribute their plight to poor consultations with the mining companies.</p> <ul style="list-style-type: none"> Source 1: Focus Group Discussions in 6 communities between January and February 2017. [Many community members in Kitui, Kwale and Taita Taveta Counties have grievances which can be traced back to lack of information in the formative stages of the mining project and poor consultation processes.]
<p>3. There are communities that have ceded some of their property to investors – and they feel compensation was not adequate - because they did not understand the terms as spelled out in the consultations with mining companies and their representatives. In this case ‘Free Prior Informed Consent’ will not have been fulfilled fully.</p> <ul style="list-style-type: none"> Source: Expert interview; Land and Livelihood Lead at ActionAid Kenya, (21-03-2017), [Said that communities that are not prepared will tend to make bad bargains with mining companies and their representatives].
<p>4. Lack of effective consultations has led to conflict between affected companies and communities</p> <ul style="list-style-type: none"> Source: News article, R, Mnyamwezi, (17-08-2015). https://www.standardmedia.co.ke/business/article/2000173196/hostile-residents-disrupt-iron-ore-mining-in-cess-dispute
<p>Description of impact There is need to create awareness for relevant stakeholders on the different processes, implications of the mining operations and effective engagement with the mining companies.. If mining companies do not hold proper consultations during licensing there is likely to be future confrontations due to the initial lack of clarity in the formative consultations. Aggrieved communities cannot co-exist peacefully with mining companies.</p>
<p>Assessment</p> <p>Likelihood x Impact = 4 x 5 Total score: 20</p> <p>Risk level: Very high</p>

<p>What is the risk that details of licenses etc that have been awarded will not be publicly known? Lack of transparency around license details (e.g. coordinates of license area, date of award, duration of license, social and environmental obligations, work program, or the commodity being produced) creates opportunities for illegal mining (e.g. mine outside the license area, beyond the license period, and to exploit non-approved minerals), and therefore allow companies to bribe officials to ignore these activities.</p>	<p>Code</p> <p>PD36</p>
<p>Likelihood</p> <p>Score</p> <p>4/5</p>	<p>Evidence to support assessed likelihood</p> <ol style="list-style-type: none"> Mining licenses in Kenya are not publicly knowable or at least details of these licenses are not known to all. <ul style="list-style-type: none"> Source: (a) A check on the Ministry of Mining website and on the cadastre portal. The license register is not readily available. http://mining.go.ke (b) Land access permits register is not available in the Ministry of Lands and National Lands Commission websites. Requesting this information from the offices is difficult according to Kenya Land Alliance representative.

<p>2. The ministry maintains that many aspects of the mining license are sensitive and confidential and therefore not readily available to everyone.</p> <ul style="list-style-type: none"> Source : News article, A. Jamah, (19-10-2013), [Stakeholders blame secrecy clause to graft in Kenya mining sector] http://standardmedia.co.ke/mobile/article/2000095810/ Source 2: News editorial, (21-07-2017), [Kenya denies IMF access to secret mining agreements] http://www.businessdailyafrica.com/Kenya-denies-IMF-access-to-secret-mining-agreements/539546-1922406-xb9m6az/index.html 	<p>3. Mining companies have a reputation of guarding affairs around their mining licenses, and they cannot give a good reason for this.</p> <ul style="list-style-type: none"> Source 1: Expert interview: Deputy governor, Taita Taveta County (17-02-2017), [Said that mining companies generally want to be treated as a special sector where questions are not asked on their license details.
<p>Impact</p> <p>Score</p> <p>4/5</p>	<p>Evidence to support assessed impact</p> <p>1. Lack of information on license details could lead to land grabbing or encroachment on lands of neighbouring communities as witnessed in some areas.</p> <ul style="list-style-type: none"> Source 1: Focus group discussion with one community found near a major mining company in Taita Taveta County where it was claimed (and corroborated by the council of Members of the County Assembly (local government MPs) that the mining company had encroached in to their lands without their permission.
<p>2. Loss of revenues for government if a company starts operating outside the terms of the license. For instance, if a company starts mining other minerals it is not licensed for and it sells off these minerals the government may lose a lot in form of taxation and royalty revenues.</p> <ul style="list-style-type: none"> Source 1: Expert interview, Executive Director, Tax Justice Network Africa (24-02-2017) [Said that many rogue mining companies in Africa have reneged on their license terms leading to massive potential revenue sources for the government] 	<p>3. Effort has been made by The National Environmental Management Authority (NEMA) to publish all the EIA reports for major projects in the country while those at the county level can be obtained at the County NEMA offices at a fee.</p> <ul style="list-style-type: none"> Source : https://www.nema.go.ke/index.php?option=com_content&view=article&id=187&catid=9&Itemid=308
<p>Description of impact Lack of knowledge on a process means the process cannot be analysed and any meaningful questions raised. The details of these licenses spell out what the company does on the ground and these terms are meant to ensure the company only undertakes what is on the license. But if the citizenry does not have these details they cannot question any anomalies from the terms stipulated and therefore the company gets the discretion to do anything even that which is not permissible by law.</p>	
<p>Assessment</p> <p>Likelihood x Impact = 4 x 4 Total score: 16</p>	
<p>Risk level: Very high</p>	



<p>Assuming consultation with affected communities is required, what is the risk that their free, prior, informed consent (FPIC) will be ignored as a result of corrupt practices? Sometimes consent is required on paper but companies and officials are able to ignore or manipulate it by engaging in corrupt practices such as bribery and gift-giving.</p> <p>Assuming consultation with communities or landholders is required, what is the risk that negotiations for landholder or community agreements can be manipulated? Having laws that guarantee and standardize terms and conditions for conducting negotiations reduces the risk of corrupt behaviour, such as the marginalization of certain landholders, unauthorized contact in breach of terms, or the giving of bribes, gifts and benefits.</p>	<p>Code</p> <p>PP6</p> <p>PD16</p>
<p>Likelihood</p> <p>Score</p> <p>4/5</p>	<p>Evidence to support assessed likelihood</p> <ol style="list-style-type: none"> The right to Free Prior and Informed Consent (FPIC) is not legalized in Kenya or there is no clear framework to practice the FPIC principle during community engagements. It is therefore easy for corruption to occur in the absence of FPIC. <ul style="list-style-type: none"> Source: Kenya Civil Society Platform on Oil and Gas Agenda for Kenya's Oil and Gas Development, Policy Resolution Paper, 2015. https://goo.gl/IYPwrl Source 2: Expert interview, Kenya Land Alliance representative, (25-03-2017). [The government has not appreciated fully the principle of FPIC when introducing investors to communities. There are no legal provisions for FPIC].
	<ol style="list-style-type: none"> The lack of regulations and guidelines on landholder/community engagement has enabled powerbrokers to thrive and to lead the process of these agreements between companies and communities. In some counties cases have been reported of specific people from these areas being used to convince communities to give assent even despite the unfavourable terms presented to the landholders and communities. <ul style="list-style-type: none"> Source 1: Focus Group Discussions in 6 communities between January and February 2017. [All these communities admitted to have no knowledge of any structured program for community consultation.]
	<ol style="list-style-type: none"> Communities do not understand their rights in regards to their land and property and the right to be consulted and to give consent. <ul style="list-style-type: none"> Source 1: Focus Group Discussions in 6 communities between January and February 2017. [All these communities admitted to have no knowledge of any structure program for community consultation.] Source 2: Community Perceptions Assessment report, Cordaid Kenya, August 2015. Pg. 30. https://www.cordaid.org/media/medialibrary/2015/09/Turkana_Baseline_Report_DEF-LR_Cordaid.pdf
<p>Impact</p> <p>Score</p> <p>5/5</p>	<p>Evidence to support assessed impact</p> <ol style="list-style-type: none"> Communities are left confused and disenfranchised as there are no clear guidelines on how the process should be and even the few guidelines that are used for these engagements are not communicated well to these communities. <ul style="list-style-type: none"> Source 1: Expert Interview, Caritas Staff, Kitui, (12-01-2017) Source 2: Community Perceptions Assessment report, Cordaid Kenya, August 2015. Pg. 30. https://www.cordaid.org/media/medialibrary/2015/09/Turkana_Baseline_Report_DEF-LR_Cordaid.pdf
	<ol style="list-style-type: none"> There have been many complaints about land in many mining locales in the country and they all attribute their plight to poor consultations with the mining companies. <ul style="list-style-type: none"> Source 1: Norwegian Church Aid publication: Local Communities in Kenya's Extractive Sector, From Paternalism to Partnership. – www.goo.gl/cC5paV

3. Conflicts as a result of poor consultation processes .

- *Source: Expert interview; Land and Livelihood Lead at ActionAid Kenya, (21-03-2017), [Said that communities that are not prepared will tend to make bad bargains with mining companies and their representatives].*

4. There are some efforts by government to improve the land access process such as systems automation.

- **Source:** Government portal news, (22-01-2016), [Good News for Kenyans as Land Search, Rent Payments go Online] <http://www.mygov.go.ke/?p=5827>
- **Source:** Expert [interview: chairperson of the National Land Commission. \(24-04-2017\)](#)

Description of impact- there is need for awareness creation among all the relevant stakeholders on effective consultations and engagements as this eradicates and prevents conflicts between different parties which would otherwise occur due to lack of proper and structured consultations or conducting unstructured and manipulated consultations. Communities need to be made fully aware of the implications of the mining operations and how to engage with the mining companies.

Assessment

Likelihood x Impact = 4 x 5

Total score: 20

Risk level: **Very high**

<p>What is the risk that community leaders negotiating with a mining company will not represent community members' interests? Community leaders who are aligned to the ruling political party, have a network of business interests and contacts, have few other sources of income, or who are only weakly accountable to their community members, present a corruption risk to the integrity of community agreements because they have incentives to pursue private interests instead of community interests.</p>		<p>Code</p> <p>PP7</p>
<p>Likelihood</p> <p>Score</p> <p>4 / 5</p>	<p>Evidence to support assessed likelihood</p> <p>1. In Kitui County the Community Liaison Committees did not represent community interests as was anticipated by the communities.</p> <ul style="list-style-type: none"> • <i>Source: (a) Rapid Assessment Report, Diakonia Kenya, December 2014. [Rapid Assessment of The Extractive Industry Sector in Kitui County: The Case of Coal Exploration and Mining in the Mui Basin]. https://www.diakonia.se/globalassets/documents/diakonia/where-we-work/africa/kenya-2014-rapid-assesment-coal-mining-kitui.pdf</i> <p>2. Communities do not have confidence in the people who are chosen to represent them as they claim that these representatives start seeking their own selfish interests and it is claimed that these individuals are bribed by companies</p> <ul style="list-style-type: none"> • <i>Source: Focus group discussion with 4 community groups in Kitui County and Kwale County. They claimed that these chosen committees often do not articulate their real issues thereby their concerns are not heard.</i> • <i>Source: Rapid Assessment Report, Diakonia Kenya, December 2014. [Rapid Assessment of The Extractive Industry Sector in Kitui County: The Case of Coal Exploration and Mining in the Mui Basin]. https://www.diakonia.se/globalassets/documents/diakonia/where-we-work/africa/kenya-2014-rapid-assesment-coal-mining-kitui.pdf</i> 	



<p>3. Representatives for community interests have been vested with so much power and responsibility and checks so as to avoid abuse of these responsibilities. Often these representatives make decisions on behalf of the communities without even consulting these communities.</p> <ul style="list-style-type: none"> Source 1: Expert interviews: Representative, Kenya National Commission on Human Rights, KNCHR (14-03-2017) 	
<p>Impact</p> <p>Score</p> <p>4 / 5</p>	<p>Evidence to support assessed impact</p> <p>1. Conflict between the mining companies and the communities is rife in cases where selected representatives have not fully presented the community positions.</p> <ul style="list-style-type: none"> Source 1: Assessment Report, UNDP Kenya, September 2014. [Extractive Industries for Sustainable Development in Kenya] https://goo.gl/OqYXe3
<p>2. There is a perceived 'too-close-for-comfort' relationship between companies, certain community leaders and politicians, in which short-term, 'transactional' deal-making is favored rather than systematic and inclusive community engagement. This perception makes communities perpetually wary of companies.</p> <ul style="list-style-type: none"> Source 1: Assessment report, Cordaid Kenya. August 2015. [Assessment of Community Perceptions of Oil Exploration in Turkana County, Kenya] pg. 9. https://www.cordaid.org/media/mediabrary/2015/09/Turkana_Baseline_Report_DEF-LR_Cordaid.pdf 	
<p>3. Communities aspirations end up not achieved when they are not well represented by those they have chosen to represent them.</p> <ul style="list-style-type: none"> Source: Focus group discussion with 6 community groups in Kitui, Kwale and Taita Taveta Counties. There is a prevailing belief by all these communities that those chosen to represent them end up being compromised through bribery, gifts or being offered jobs at the company. 	
<p>4. The civil society in many areas of the country such as in Kitui has been working hard to sensitize the communities on effective methods of engagement with the mining companies and how to work with representatives.</p> <ul style="list-style-type: none"> Source 1: Expert interview, Research officer, Extractive Sector Observatory, (13-04-2017) 	
<p>Description of impact Poor representation</p>	
<p>Assessment</p>	
<p>Likelihood x Impact = 4 x 4 Total score: 16</p>	
<p>Risk level: Very high</p>	

<p>What is the risk there is no verification of the accuracy or truthfulness of environmental impact assessment (EIA) reports? If EIA reports are not verified it allows stakeholders to be misled about the environmental impacts of a mine. Companies can corruptly manipulate environmental data including creating false baselines for environmental data and falsifying impacts.</p>		<p>Code</p> <p>PP9</p>
<p>Likelihood</p> <p>Score</p> <p>5 / 5</p>	<p>Evidence to support assessed likelihood</p> <p>1. Environmental Impact Assessments are done by the proponent (mining company) and its their prerogative to select and pay the individual/firm that carries out the assessment. This raises the question of whether the expert will freely present unfavourable data that may jeopardize the prospect of the project kicking off.</p> <ul style="list-style-type: none"> Source: Expert interview with the EIA Lead at the National Environment Management Authority (NEMA): (20-02-2017) 	

	<p>2. Given the large number of environmental license applications in Kenya – and the small team assigned to evaluate them - it becomes very difficult for there to be effective and thorough evaluation of the contents of the EIAs.</p> <ul style="list-style-type: none"> Source: <i>Opinion article, Pambazuka News, J. Kakonge, (07-10-2017). [Environmental Impact Assessment: Why it Fails in Kenya]. http://www.goo.gl/IzfHkm</i>
	<p>3. In some cases, large infrastructure developments such as the Lamu Port Southern Sudan Ethiopia Transport Corridor (LAPPSET) project did not carry out a comprehensive EIA before the commencement of the project or the impact as indicated in the EIA was not verified well leading to massive destruction of mangroves and human settlement.</p> <ul style="list-style-type: none"> Source: <i>Sector Brief, Kariuki Muigua, 2014. [Environmental Impact Assessment (EIA) in Kenya]. Pg. 8. http://www.goo.gl/jynxQb</i>
	<p>4. Due to the large number of lead agencies it is very easy for the EIA process to be mired in conflict with the lead agencies over important sections of the process and this has been observed in many cases. Some lead agencies are also slow in giving input into the process therefore verification of some information is not achieved in this regard.</p> <ul style="list-style-type: none"> Source 1: <i>Expert interview, Senior Manager, Natural Resources and Environmental Monitoring, WWF Kenya.</i> Source 2: <i>Sector Brief, Kariuki Muigua, 2014. [Environmental Impact Assessment (EIA) in Kenya]. Pg. 8. http://www.goo.gl/jynxQb</i>
<p>Impact</p> <p>Score</p> <p>5/5</p>	<p>Evidence to support assessed impact</p> <p>1. Environmental impacts unravel if safeguards are not put in place and if these impacts were not foreseen. EIAs that do not provide concrete environmental management plans are likely to expose the environment to negative environmental effects which in turn will affect communities found in the area.</p> <ul style="list-style-type: none"> Source 1: <i>Interviews with two communities that are adjacent to Base Titanium Ltd where they claimed that their water sources had been polluted and palm trees affected by effluents from the mining company. January 2017.</i> Source 2: <i>Institute of Human Rights and Business Publication titled “Human Rights in Kenya’s Extractive Sector” page 57, explains https://www.ihrb.org/uploads/reports/IHRB%2C_Human_Rights_in_Kenyas_Extractive_Sector_-_Exploring_the_Terrain%2C_Dec_2016.pdf</i>
	<p>2. When EIAs are undertaken without due regard to real potential impacts and data from the field it encourages a perpetuating practice where companies prescribe to EIA experts what they want to be captured in the EIA reports.</p> <ul style="list-style-type: none"> Source 1: <i>Expert interview, ILEG Kenya, (14-04-2017).</i> Source 2: <i>Opinion article, Pambazuka News, J. Kakonge, (07-10-2017). [Environmental Impact Assessment: Why it Fails in Kenya]. http://www.goo.gl/IzfHkm</i>
	<p>3. Communities lose trust and confidence in the environmental authority when environmental impacts start occurring within their areas because they expect this to have been monitored and controlled by government (NEMA)</p> <ul style="list-style-type: none"> Source: <i>Roundtable Discussion with two senior World Bank Leads on Extractives Sector in Nairobi, Kenya, March 2017.[That the rights of communities can be greatly affected when their views on their environment are ignored].</i>

4. The efforts that stakeholders have been working on to make the National Environmental Authority (NEMA) more robust and effective have been affected by changes in the administrative framework of NEMA as crucial fees that the institution depended on have been scrapped and funding scaled down.

- Source: Expert interview with the EIA Lead at the National Environment Management Authority (NEMA): (20-02-2017)
- Source 2: Unpublished paper, Centre for Sustainable Urban Development, University of Nairobi, B. Barczewski (2013). [How well do environmental regulations work in Kenya? The case of the Thika Highway Improvement Project].

Description of impact If there is a case of falsification of EIA contents it would easily lead to environmental degradation and disruption of normal livelihood activities as some of these environmental impacts are devastating. The lack of verification of EIA findings encourages more and more investors/developers to continue flouting environment regulations with no regards to compliance with the existing framework.

Assessment

Likelihood x Impact = 5 x 5

Total score: 25

Risk level: **Very high**

What is the risk that in practice there is no due diligence on applicants' claims regarding their capacity and financial resources? A cadastre agency may have no system to do due diligence on applicants, or it may have a system but in practice no checks are actually done. If companies' proof of capacity and financial resources is not checked, it creates an opportunity to falsify details or to bribe officials to accept their bona fides at face value.

Code

PP10

What is the risk that there is no due diligence on applicants' integrity, such as past lawful conduct and compliance? An absence of background checks on integrity could mean that criminal interests or past illegal behavior are overlooked, allowing applicants with a high likelihood of engaging in corruption into the mining sector.

PP11

Likelihood	Evidence to support assessed likelihood
Score 4/5	<ol style="list-style-type: none"> Processes in Kenya in many sectors do not put important focus on doing due diligence to ascertain the truthfulness of the information presented by service seekers and license applicants. This problem cuts across the different sectors and it has not been managed and controlled. <ul style="list-style-type: none"> Source: (a) Expert interview with Land and Livelihood Lead at ActionAid Kenya in March 2017. (b) Expert interview with a representative (a lawyer) from the Institute for Law and Environmental Governance in April 2017.

2. Application for mining licenses and permits only focuses on the information provided such as technical details of the project and the financial capability. Retrospective integrity checks are not done and there are no guidelines in the laws to direct how these checks are carried out.

- Source: (c) Expert interview, Former employee, Ministry of Mining Cadastre Department (Formerly called Commissioner of Mines Dept).

3. The ministerial taskforce in 2013 on state of mineral licenses in Kenya exposed a good number of licenses whose financial position could not even finance the most basic item for a possible mineral exploration or production. Most of these companies were 'briefcase companies whose only agenda was to horde licenses speculatively seeking capital partners, sometimes for several years.

- Source 1: Editorial report, The East African Newspaper, (10-08-2017) [Outcry, bribery claims over mining licences recall]. <https://goo.gl/eHDYqh>

<p>4. There are known individuals with questionable past deals who currently hold exploration and production licenses</p> <ul style="list-style-type: none"> Source 1: Expert interview, Anonymous Kwale County Government official, (18-01-2017), [On claims that a known prominent individual with a corrupt past has interests in mining in the County and in neighbouring Counties.] 	
<p>Impact</p> <p>Score</p> <p>5/5</p>	<p>Evidence to support assessed impact</p> <ol style="list-style-type: none"> There is a risk of introducing individuals and companies into the sector who will propagate corrupt practices in the sector. <ul style="list-style-type: none"> Source 1: Expert interview, Cliff Ortega, Managing Director, Standard and Mutual (18-04-2017). [Contends that the less corrupt companies the sector receives the less problems the sector will experience in the long term. Pointed out case study of DRC where many companies engage in corruption and the resultant effect]
<p>2. Companies coming into the sector with poor financial positions will most likely slow down the pace for the development of the sector.</p> <ul style="list-style-type: none"> Source 1: Part of speech by the Ministry of Mining Cabinet Secretary at the submission of a taskforce report on mining, (29-01-2014) 	
<p>3. The new set of laws and regulations have very progressive safeguards in ensuring that only serious and honest companies get an opportunity to operate in the country. Although the only challenge would be in the implementation of these new legal instruments. Implementation is always the problem in Kenya.</p> <ul style="list-style-type: none"> Source 2: Expert interview, Extractives Regional Manager, Adam Smith International, (04-04-2017) [Pointed out Kenya has got very good laws but the problem is the 'human factor' where people entrusted with official responsibility try to bend rules for selfish corrupt ends] 	
<p>Description of impact When unchecked, mining companies could present false information on important aspects such as financial capital available and assets held. Some of these companies have corrupt pasts and have been involved in various malpractices. If these kinds of companies set up in a country they will inevitably influence the way things are done setting a new tone where transparency and accountability are not important factors.</p>	
<p>Assessment</p> <p>Likelihood x Impact = 4 x 5 Total score: 20</p> <p>Risk level: Very high</p>	

<p>What is the risk that criteria for EIAs will not be publicly knowable? Unclear or unknown criteria for EIAs create uncertainty about what environmental factors were assessed, creating an opportunity to manipulate what gets assessed.</p>		<p>Code</p> <p>RA6</p>
<p>Likelihood</p> <p>Score</p> <p>4/5</p>	<p>Evidence to support assessed likelihood</p> <ol style="list-style-type: none"> The EIA process has not been sufficiently demystified to the general public therefore the criteria that is used is not known especially to rural communities where mining operations are located. <ul style="list-style-type: none"> Source: Opinion article, Pambazuka News, J. Kakonge, (07-10-2017). [Environmental Impact Assessment: Why it Fails in Kenya]. http://www.goo.gl/Izfhkm 	

<p>2. There are no sufficient funds to carry out the necessary sensitization and awareness on the EIA process to the public. This is occasioned by a systemic limitation of funds to the National Environmental Management Authority. Consequently, opportunities for corruption are opened.</p> <ul style="list-style-type: none"> Source: Expert interview, Research officer, Extractive Sector Observatory, (13-04-2017) Source 2: Expert interview, Senior Manager, Natural Resources and Environmental Monitoring, WWF Kenya. (14-03-2017) 	
<p>3. The EIA in itself is a very complex process requiring inputs from the physical, biological and social sciences including policy and planning as well as other disciplines. This makes it difficult for the general public to easily engage beyond the stipulated public consultation.</p> <ul style="list-style-type: none"> Source 1 Research Brief, J. Barnes & J. Boyle, (23-04-2015), [The Weak Link in EIA Effectiveness: Challenges in Process Administration. Pg. 4. 	
<p>Impact</p>	<p>Evidence to support assessed impact</p>
<p>Score 4 / 5</p>	<p>1. Lack of proper understanding on the EIA process may lead to corruption as communities may not adequately scrutinise the process.</p> <ul style="list-style-type: none"> Source: <u>Interviews with two communities that are adjacent to Base Titanium Ltd where they claimed that their water sources had been polluted and palm trees affected by effluents from the mining company. They said they did not understand what the EIA focused on before the project kicked off. (22-01-2017).</u>
<p>2. The EIA has been reduced to merely being a ‘tick box’ exercise because the public and other relevant stakeholders may not have a good understanding of the details of the process. Even the eventual EIA reports are not scrutinized well by the public before the issuance of the environmental license because the technical details are not communicated well to the public.</p> <ul style="list-style-type: none"> Source 1: Expert Interview, Caritas Staff, Kitui, (12-01-2017) 	
<p>3. With the enacting of the Access to Information law it is anticipated that it should be easier for the public to access information from government agencies such as the specifics of the EIA process and the EIA reports However, EIAs’ technical nature would need to be demystified in an easily understood version for the average citizen to understand.</p> <ul style="list-style-type: none"> Source: Access to Information Act http://www.goo.gl/qp47Si 	
<p>4. The High court stopped NEMA from issuing an EIA license to Tiomin Kenya (Mining Company) following the environmental conflict raised by the Centre for Environmental Legal Research and Education (Creel) that the communities did not participate in the Environmental Management Plans.</p> <ul style="list-style-type: none"> Source: Assessment Report, UNDP Kenya, September 2014. [Extractive Industries for Sustainable Development in Kenya] https://goo.gl/OgYXe3 	
<p>Description of impact Knowing the criteria the EIA process uses and the various elements under assessment is important so that these stakeholders are able give their informed input into the process. The failure to sensitise these communities would lead to poor input and absence of credible critique of the process.</p>	
<p>Assessment</p>	
<p>Likelihood x Impact = 4 x 4 Total score: 16</p>	
<p>Risk level:</p>	<p>Very high</p>

<p>What is the risk that people with knowledge of corruption in the awards process will not make a report? If potential whistle-blowers think they will be (a) ignored, or (b) targeted and persecuted for complaining about corruption, reporting is unlikely to occur. Formal whistle-blower protections can encourage whistle-blowers.</p>	<p>Code</p>
<p>What is the risk that whistle-blowers will not be legally protected? Laws to encourage and protect whistle-blowers are critical to develop and maintain anti-corruption reporting systems</p>	<p>RL6</p> <p>RL7</p>

Likelihood Score 5/5	Evidence to support assessed likelihood <ol style="list-style-type: none"> Whistleblowing in Kenya lacks a proper legal and institutional framework. Kenya has various laws that have a bearing on whistleblowing though the instruments do not cater for an active promotion of whistle blowing. “There is fear by people to whistle-blow because there have been cases where whistle-blowers have been killed or forced to flee. <ul style="list-style-type: none"> Source: Expert interviews: Representative, Kenya National Commission on Human Rights, KNCHR (14-03-2017)
	<ol style="list-style-type: none"> Co-workers tend to conceal each other’s tracks which poses a challenge in reporting of corruption. <ul style="list-style-type: none"> Source 1: News article, I. Lucheli, (15-08-2013), [Kenya Revenue Authority Officer Charged in SH4m Bribe Case] http://goo.gl/dW47u3 Source 2: Whistle-blower article, Standard Newspaper, (15-08-2013), [KRA has its work cut out to stem graft] http://goo.gl/NPytSV Source 3: Expert interview, Former employee, Ministry of Mining. Source 4: Kishushe Community interview, Taita Taveta (23-05-2017)
	<ol style="list-style-type: none"> There is lack of a structured complaints reporting system to promote to reporting and processing of corruption related cases in the awards process. <ul style="list-style-type: none"> Source: Expert interview: Actionaid Kenya representative. (21-03-2017)
Impact Score 5/5	Evidence to support assessed impact <ol style="list-style-type: none"> Whistle-blowing is crucial to the fight against corruption and without it corruption escalates. <ul style="list-style-type: none"> Source 1: Expert interview: chairperson of the National Land Commission. (24-04-2017) Source 2: Expert interview: World Bank extractives specialists (March 2017)
	<ol style="list-style-type: none"> Not every community has common acceptance of the concept, let alone clear lines of command or a hotline to report suspected fraud or corruption. there is a general reluctance to use whistle-blower channels in many cultures and a general misunderstanding of how to use them <ul style="list-style-type: none"> Source: Ernst & Young: ‘Managing fraud, bribery and corruption risks in the mining and metals industry’)
	<ol style="list-style-type: none"> The government is currently enhancing its whistle-blowing framework and has developed a whistle-blower Bill 2017 which is awaiting submission to parliament. A whistle blowing policy will soon follow. <p>Description of impact: whistleblowing in Kenya has far reaching consequences including loss of life for exposing corruption practices in a certain organization or public office - Fighting corruption requires people with knowledge of corruption incidents to report such cases to relevant authorities. Failure to make these reports (whistle-blow), the offenders are emboldened to continue with the practice. In mineral licensing, corruption would continue prevailing and even spiral to endemic levels</p>
Assessment	
Likelihood x Impact =5x 5	Total score: 25
Risk level:	Very high



Annex 4: Scores from different validation workshops

RISK	INITIAL SCORE	KWALE	TAITA	KITUI	NATIONAL	FINAL SCORE
Risk CF3	L-4; I-4	L-4; I-3	L-5; I-4	L-5; I-4	L-4; I-5	L-4; I-4
Risk CF4	L-5; I-5	L-4; I-4	L-4; I-5	L-5; I-5	L-5; I-5	L-5; I-5
Risk PD22	L-4; I-4	L-5; I-5	L-3; I-3	L-4; I-5	L-5; I-5	L-4; I-5
Risk PD3	L-4; I-5	L-4; I-4	L-5; I-5	L-3; I-3	L-5; I-4	L-4; I-5
Risk PD4	L-4; I-5	L-4; I-4	L-5; I-5	L-3; I-3	L-5; I-4	L-4; I-5
Risk PD5	L-4; I-4	L-2; I-2	L-4; I-5	L-2; I-2	L-3; I-4	L-3; I-4
Risk PD6	L-4; I-4	L-2; I-2	L-4; I-5	L-2; I-2	L-5; I-5	L-3; I-4
Risk PD8	L-3; I-5	L-5; I-5	L-4; I-5	L-4; I-4	L-4; I-4	L-4; I-5
Risk PD36	L-4; I-3				L-4; I-4	L-4; I-4
Risk PP6	L-3; I-5	L-5; I-5	L-4; I-5	L-5; I-	L-3; I-5	L-4; I-5
Risk PD16	L-3; I-5	L-5; I-5	L-4; I-5	L-5; I-	L-3; I-5	L-4; I-5
Risk PP7	L-4; I-4	L-5; I-5	L-5; I-5	L-4; I-5	L-4; I-4	L-4; I-4
Risk PP9	L-5; I-5	L-5; I-5	L-5; I-5	L-5 I-5	L-5; I-5	L-5; I-5
Risk PP10	L-3; I-3				L-4; I-5	L-4; I-5
Risk PP11	L-3; I-3				L-4; I-5	L-4; I-5
Risk RA6	L-4; I-4	L-4; I-4	L-4; I-4		L-4; I-4	L-4; I-4
Risk RL6	L-4; I-5	L-5; I-5	L-5; I-5	L-5; I-5	L-5; I-5	L-5; I-5
Risk RL7	L-4; I-5	L-5; I-5	L-5; I-5	L-5; I-5	L-5; I-5	L-5; I-5



HEAD OFFICE

Kindaruma Road, Off Ring Road, Kilimani,
Gate No. 713; Suite No. 4
P.O BOX 198 - 00200, City Square, Nairobi, Kenya
Tel: +254 (0) 202 727 763/5, +254 733834659,
+254 722 296 589
Fax: +254 20 272 9530 Email: transparency@tikenya.org

ALAC ELDORET

Catholic Diocese of Eldoret, Uganda Road, Eldoret
Tel: +254 53 2033100 Mobile: 0704 899 887
Email: alaceldoret@tikenya.org

ALAC NAIROBI

Kindaruma Road, Off Ring Road, Kilimani, Gate No. 713; Suite No. 4
PO BOX 198 - 00200, City Square, Nairobi, Kenya
Tel: +254 (0) 202 727 763/5, +254 722 296 589
Fax: +254 20 272 9530 Email: transparency@tikenya.org

ALAC MOMBASA

2nd floor, KNCHR offices Panal Freighters Lane
off Haile Selasie Avenue, Behind Pride Inn Hotel, Mombasa CBD
Tel: 072 841 88 22 Hotline: 0800 720 721
Email: alacmombasa@tikenya.org

ALAC WESTERN

P.O.BOX 3560-40100, RIAT along Kisumu-Kakamega Road, Kisumu
Mobile: 0716 900 227
Email: alacwestern@tikenya.org



TRANSPARENCY
INTERNATIONAL
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@TIKenya



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