SUMMARY OF THE MINING ACT, 2016

I. Introduction

The Act repeals the Mining Act of 1940, and introduces provisions for environmental protection, technology transfer, resource distribution and economic incentives in conformity with the constitution, specifically Article 60, 62(1(f), 66(2) and 69 and 71 in so far as they apply to prospecting, mining, processing and any dealings in minerals. Article 69b of the constitution requires consideration of the environment in mining activities.

The Act states categorically that all minerals within the territory of Kenya are the property of the republic and are vested in the National government (Section 6, 1). The National government is also awarded pre-emptive rights of all strategic minerals within the territory of Kenya (Section 8). This obligates a mineral rights holder to offer the National Government the first option to buy the minerals before offering them to other potential buyers in the market. The Act also entitles the National government 10% free carried interest for a large scale mining operation (Section 48, 1). Further, the Act requires distribution of mining royalties as follows: 70 per cent to the National Government, 20 per cent to the County Governments and 10 per cent to the community where the mining operations occur (Section 183, 5).

Mineral rights under the Act are offered in form of licences for large scale operations and permits for small scale operations (Section 3). They include prospecting licence, retention licence, mining licence, prospecting permit, mining permit or artisanal permit. The power to grant, deny or revoke a mineral right is vested in the Cabinet Secretary on the advice of the Mineral Rights Board (Section 4). Before issuance of a mineral right, the land owners, community and relevant County governments must be duly notified (Section 34, 1). Mining on private land requires consent of the registered owner of the land (Section 37, 1). The applicant is also required to seek approval of relevant authorities such as the Kenya Forest Service (KFS) if the land is situated within a forest area (Section 36, 2, g).

II. Mining Institutions and bodies established under the Act

1. National Mining Corporation (Section 22): An investment arm of the National government in respect of mining operations. The Corporation is managed by a Board.
2. Mineral and Metal Commodity Exchange (Section 28): A market place for minerals. The purpose is to facilitate efficiency and security in mineral trade transactions.
3. **The Mineral Rights Board** (Section 30): The board is intended to give advice and recommendations to the Cabinet Secretary on Mineral Rights Agreements and the areas where mining operations may be excluded and restricted among others.

4. **Directorate of Mines and Directorate of Geological Survey** (Section 17): The core function of the Directorate of Mines is to regulate the mining sector (monitoring compliance and enforcement). The Directorate of Geological Survey is charged developing the national geological database.

5. **Artisanal Mining Committee** (Section 94): A County based committee to advise the representative of the Director of Mines in matters relating to granting, renewal or revocation of artisanal mining permits. It includes a representative of the National Environment Management Authority (NEMA).

**I. Social protection and technological advancements**

The Act requires miners to invest in and facilitate social responsibility activities with local communities. Section 46 requires a mineral right holder to transfer skills and build capacity of Kenyans, while Section 47 provides for preference in employment of citizens, and Section 47 (2g) makes it mandatory for a holder of a large scale mining licence to implement a Community Development Agreement (Section 47, g). The Act also provides for the prioritization of locally procured products (Section 50). To further empower citizens, the Act requires a mining licence holder, whose planned capital expenditure is over a prescribed threshold to offer a minimum of 20% of its equity to the public on a local stock exchange (Section 49, 2).

The Act embraces technological advancements by providing for a computerized mining cadastre and registry system which includes an online transactional facility to allow applications for granting and renewal of mineral rights to be submitted online (Section 192, 3). The public is allowed to access the mining cadastre.

**II. Provisions of the Act relevant to forestry**

a) **Protection of the environment**
The Act has provisions for health, safety and the environment (Part XI). Section 176 (1) expressly provides that ownership of mineral rights will not exempt a person from complying with any law concerning the protection of the environment. Section 176 (2) further provides that granting a licence issued under the Act is based on evidence of an approved Environmental Impact Assessment (EIA) licence, Social Heritage Assessment and the Environmental Management Plan in line with the provisions of EMCA. The licence/permit holders are also required to take all necessary measures to protect the environment (Sections 127b, 133b, 140c). This process is verified by the National Environmental Management Authority (NEMA).

b) Environmental rehabilitation and restoration
Section 180 (1) provides that the Cabinet Secretary shall not grant a mineral right unless the applicant has submitted an environmental rehabilitation and restoration plan. Section 77 (1, d) and 89 (d) further mandates the holders of mineral rights to comply with the requirements of the environmental rehabilitation and restoration plan. Section 180 (2) provides that the Cabinet Secretary may prescribe regulations for site rehabilitation and mine closure obligations.

c) Environmental protection bond
An applicant for a prospecting licence, retention licence or mining licence must provide a bond or similar financial security sufficient to cover the costs associated with the implementation of their environmental and rehabilitation obligations in accordance with EMCA (Section 181 pt. 1). The bond to be paid by the applicant shall be determined by the Cabinet Secretary (Section 181 pt. 2). This bond is also fully released if there has been successful completion of all environmental and rehabilitation obligations (Section 181 pt. 4).

d) Water rights, Sustainable land use and pollution control
Section 177 expressly states that provisions of the Act and any right or entitlement conferred under a mineral right shall not exempt a person from compliance with the provisions of the Water Act, 2002 concerning the right to the use of water from any water resource. A holder of a mineral right is also required to ensure that land is used in a sustainable manner. Section 179 requires the holder of a permit or licence under the Act to ensure the sustainable use of land through restoration of abandoned mines and quarries; that the seepage of toxic waste into streams, rivers, lakes and wetlands is avoided and that disposal of any toxic waste is done in the approved areas only. Vibrations and blasts are regulated to permissible levels according to EMCA, and that upon completion of prospecting or mining, the land in question shall be
restored to its original status or to an acceptable and reasonable condition as close as possible to its original state.

e) Environment and Land Court
Section 200 provides that the Cabinet Secretary or a public officer may apply to the Environment and Land Court for orders compelling a person to immediately stop activities related to prospecting or mining where it is believed that such operations are being carried out in contravention of the provisions of the Act. The Court handles all disputes related to the environment.