



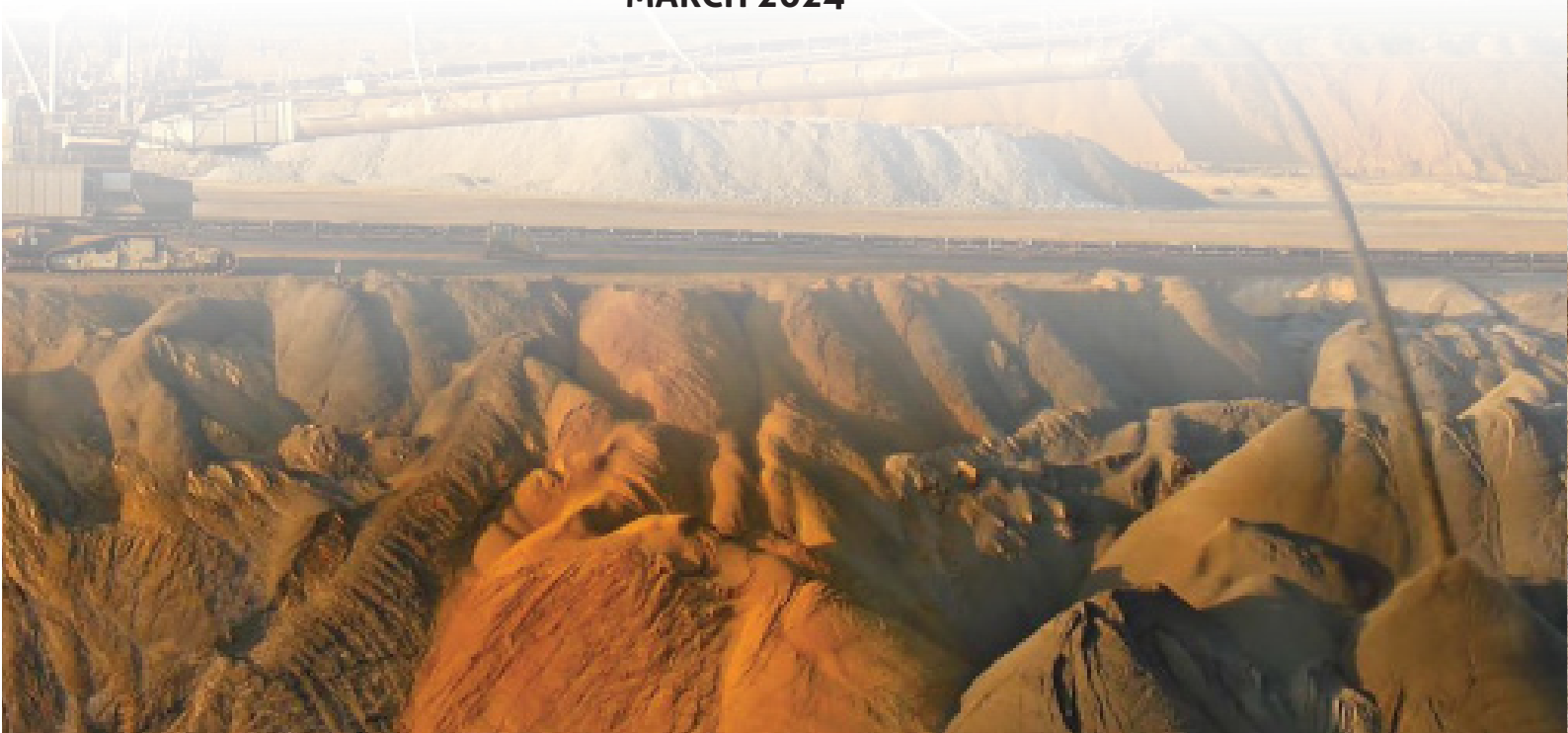
GLOBAL FINANCIAL INTEGRITY

MEDIA FACT SHEET ON COMPLIANCE AND GAPS IN BENEFICIAL OWNERSHIP IN THE MINING SECTOR IN KENYA

MARCH 2024

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ABBREVIATIONS

BO: Beneficial Ownership

OMC: Online Mining Cadastre

EITI: Extractive Industries Transparency Initiative

PPPs: Public–Private Partnerships

UBO: Ultimate Beneficial Owner



1 | INTRODUCTION

Kenya has a wide variety of minerals and a recent survey revealed that 970 minerals exist within the country. They are identified as “prospects’ subject to further work to determine their nature, profit potential, and total values. These minerals include industrial minerals, base metals, precious and rare and radioactive minerals, gemstones, construction and building materials, and geothermal and heat resources¹. Some of the minerals found in Kenya include barite, gypsum, gold, silver, lead, talc, titanium, salt, different gemstones (mostly ruby and many varieties of garnets), dimension stones, silica sand, and heavy minerals². For example, Mrima Hill in Kwale County, Coastal region, has one of the top five rare earths in the world (REEs)³. Also, the region has known niobium deposits that valued at about Ksh 250.000 billion. There are numerous mines in Kenya, public and private and the most frequently reported commodities in these mines include gold, manganese, and rare earth elements (REE). The Kenyan government has been pushing forward to exploit more resources from these mineral resources and expand its mining sector⁵.

Kenya’s mining sector has been gaining momentum and contributing more to the country’s GDP in recent years. The mining sector is regulated by the Ministry of Petroleum and Mining. The ministry has systems meant to promote transparent, accountable, and participatory revenue management from extractive industries, in addition to implementing progressive legislation to ensure that the value of the extractive sector is realized. Mining and quarrying contributed 120.3 billion Kenyan shillings (KES), (USD \$826 million) to Kenya’s GDP in 2022⁶. This was a notable increase in value compared to recent years and, the trend⁷ has been increasing since 2018. In the first quarter of 2022, the sector recorded a growth of 22.1%⁸. It is worth noting that though the mining sector has grown, it only contributes a meager one percent to Kenya’s GDP and has the capability of delivering up from 4% to 10% of the country’s GDP. This shows that a lot of Kenya’s natural resource wealth is still lying underexploited as well as the need for an analysis on the beneficial ownership that could be a great opportunity for growth and efficiency⁹.

¹ Mercy Simiyu. Survey reveals Kenya has some 970 minerals | Nation. Nation Africa. 2023 <https://nation.africa/kenya/news/survey-reveals-kenya-has-some-970-minerals-4157400>

² The East African. Kenya’s \$100 billion hidden mineral deposits - The East African. 2013. <https://www.theeastafrican.co.ke/tea/news/east-africa/kenya-s-100-billion-hidden-mineral-deposits--1317934>

³ Nyakinye M. A Summary of the Geology and Mineral Resource potential of Kenya | National Geodata Centre (NGDC) for Kenya. NGDC. 2022 [accessed 2023 Nov 3]. <https://ngdckenya.bgs.ac.uk/geology/>

⁴ Nation Africa. (n.d.). Why Sh250 billion niobium find lies untapped 93 years later | Nation. Retrieved, from <https://nation.africa/kenya/life-and-style/smart-company/why-sh250-billion-niobium-find-lies-untapped-93-years-later-832254>

⁵ The East African Op. cit

⁶ WB. Kenya: mining GDP growth rate 2019_2022 | Statista. 2022. <https://www.statista.com/statistics/1283477/mining-quarterly-gdp-growth-rate-in-kenya/>

⁸ WB Op. Cit.

⁹ Onditi D. Reviving the mining sector - KNCCI. KNCCI. 2022 [accessed 2023 Nov 3]. <https://www.kenya-chamber.or.ke/2022/06/29/reviving-the-mining-sector/>



2 | WHAT IS BENEFICIAL OWNERSHIP?



Beneficial owners are always natural persons who ultimately own or control a legal entity or arrangement, such as a company, a trust, a foundation, etc., This also includes any individual or group of individuals who, directly or indirectly, have the authority to vote or influence transaction choices involving a specific security, such as business shares.

Beneficial ownership in Kenya is defined, according to the Companies (Beneficial Ownership Information) Regulations, 2020, as a natural or legal person who owns shares in a corporation and has enough control over it to benefit from it. A beneficial owner is a natural person who ultimately owns or controls a legal person or on whose behalf transactions are made and includes those persons who exercise ultimate effective control over a legal person or arrangement. According to B.O. regulations 2020, a beneficial owner is any natural person who is either directly or indirectly¹⁰:

- ⊕ Holds at least ten percent (10%) of the issued shares in the company.
- ⊕ Exercises at least ten percent (10%) of the voting rights in the company.
- ⊕ Holds a right, directly or indirectly, to appoint or remove a director of the company.
- ⊕ Exercises significant influence or control, directly or indirectly over the company.

¹⁰ Alex Mathini. Kenya: Beneficial Ownership frequently asked questions (FAQs) – Private Equity - Bowmans. Bomans Law. ²⁰²¹. <https://bowmanslaw.com/insights/private-equity/beneficial-ownership-frequently-asked-questions-faqs-private-equity/>

3 | WHAT IS THE COMPLIANCE FRAMEWORK?

Compliance with the beneficial ownership framework in Kenya seeks to curb fraudulent financial transactions by promoting clarity about the beneficial ownership of legal entities.



Register of Beneficial Owners:

All companies are required to maintain a list of their beneficial owners. Information of beneficial owners to be submitted under the regulation has to be entered into a register.



Submission to Registrar:

Within thirty days of completion, companies must submit their registers to the Registrar.



Notification of Changes:

All companies must file with the Registrar changes to their beneficial ownership within 14 days of any change. However, listed companies are exempted from filing changes to their beneficial ownership.



Non-compliance:

Regulations in Kenya require companies to give notice of warning to non-complying beneficial owners and also block the interest of the latter. Failure to comply attracts penalties or reporting to the registrar if it persists.



Online Central Beneficial Ownership Registries:

Kenya launched online central beneficial ownership registries to comply with international transparency standards.



4 | WHAT IS THE LEGAL FRAMEWORK FOR BENEFICIAL OWNERSHIP IN KENYA?

Beneficial ownership is an essential factor in the mining industry in Kenya. Therefore, the concept of beneficial ownership has a combination of legal frameworks that can be used to solve a number of challenges:

- **The Companies Act, 2015:**

The Companies Act, 2015 is a significant piece of legislation governing companies in Kenya. It replaced the previous Companies Act of 1948 and introduced several important changes and modernizations to the corporate legal framework in the country.

- **The Mining Act, 2016:**

The Mining Act, 2016 is a key piece of legislation that governs the mining sector in Kenya. This Act was enacted to provide a comprehensive legal framework for the exploration, development, and exploitation of mineral resources in the country.

- **Companies (Beneficial Ownership Information) Regulations 2020:**

These regulations came into force on 18th February, 2020. They provide guidelines on the criteria for a person to qualify as a beneficial owner, the contents of the beneficial ownership register, the filing requirements with the registrar of companies, and the restriction on disclosure of information contained in the beneficial owners register.

- **Companies (Beneficial Ownership Information) (Amendment) Regulations, 2022:**

Introduced through Legal Notice No. 32 of 2022, these regulations introduce additional provisions regulating the disclosure of beneficial ownership information.

- **The Proceeds of Crime and Anti-Money Laundering Act, 2009 (No. 9 of 2009):**

This is a key piece of legislation in Kenya that provides the legal framework for combating money laundering and related offences.



5 | WHAT DOES KENYA'S LAW SAY ABOUT BENEFICIAL OWNERSHIP AND THE MINING SECTOR IN KENYA?

The Anti-Money Laundering and Combating of Terrorism Financing Laws (Amendment), 2023, recently adopted Amendments introduced the concept of a Beneficial Owner in the Banking Act, the Central Bank Act and the Microfinance Act by aligning the definition as contained in the Companies Act. The Amendments further brought foreign limited liability partnerships into the ambit of Beneficial Ownership disclosures.

No.	Principal Act	Amendment	Relevant Section(s)	Summary
1	The Companies Act, 2015	The Statute Law (Miscellaneous Amendment) Act 2019	Section 93A	It made amendments to the Companies Act, 2015, by introducing Section 93-A, which requires every company registered in Kenya to prepare and keep a register of its beneficial owners. It provides guidelines on the types of companies, formation and registration of companies, company's constitution, capacity of company, and name of company. Companies are required to lodge with the Registrar the register within thirty days after completing its preparation. All companies must file with the Registrar changes to their beneficial ownership.
		The Companies (Beneficial Ownership Information) Regulations, 2020		It provided guidelines on the criteria for a person to qualify as a beneficial owner, the contents of the beneficial ownership register, the filing requirements with the registrar of companies, and the restriction on disclosure of information contained in the beneficial owners register. According to Companies (Beneficial Ownership Information) Regulations, 2020, companies must take into account both personal and collective ownership when assessing whether a beneficial ownership threshold is achieved.

		Companies (Beneficial Ownership Information)		Introduced by Kenya's Attorney General, the Companies (Beneficial Ownership Information) (Amendment) Regulations, 2022 requires every company registered in Kenya to prepare and keep a register of its beneficial owners.
		(Amendment) Regulations, 2022		
2	The Mining Act, 2016	-	Section 6	<p>The Mining Act, 2016 provides a comprehensive legal framework for the mining sector in Kenya, including guidelines on the ownership of minerals, acquisition of mineral rights, and administration of mining activities. It also provides clear guidance on mining activities in Kenya and introduces legalization of artisanal miners and transparency and accountability through the use of the Online Mining Cadastre portal for licensing and for management of mineral rights and permits. The Act aims to implement the principles outlined in Article 60 of the Constitution of Kenya, on land policy. The Act is generally regarded as a modern law with clearly defined timelines and structures. It relates to prospecting, mining, processing, refining, treating, transporting, and dealing with minerals¹²</p> <p>The Act further requires the Cabinet Secretary in charge of the Mining and Minerals Sector to make Regulations which may be required or suitable for facilitating the correct application and enforcement of the legislation. Several regulations have been enacted under the Act, including regulations over the issuance of permits and licenses for mining activities, regulations regulating the use of assets in the mining, and regulations that a miner holding a mining right must export the extracted mineral¹³.</p>

¹² Mining and Minerals Policy. 2016.

¹³ Kenya G of. Mining Act 2016. Laws of Kenya (Government Printer, Nairobi). 2016 [accessed 2023 Nov 3]. <https://kam.co.ke/mining-act-2016/>

6 | WHO ARE THE BENEFICIARIES IN THE MINING SECTOR IN KENYA?

As per the Companies (Beneficial Ownership Information) Regulations, 2020, the beneficiaries and the stakeholders of the mining sector are¹⁴ :

- i. **Investors:**
Both local and foreign investors benefit from the revenues generated from mining activities
- ii. **Local Artisanal and Small-Scale Miners:**
These miners benefit from the opportunities created in the sector, including job creation and income generation¹⁶.
- iii. **National and County Governments:**
The governments benefit from the taxes and royalties mining companies pay.
- iv. **Local Communities:**
Communities living near mining areas often benefit from community development initiatives mining companies fund.
- v. **The People of Kenya:**
The general population benefits indirectly through improved infrastructure, job creation, and economic growth stimulated by the mining sector.

¹⁴ Onditi D Op. Cit

¹⁶ Mining M of Mining and Minerals Policy Op. Cit.



7 | WHAT IS THE STATE OF COMPLIANCE WITH BENEFICIAL OWNERSHIP REGULATIONS IN THE MINING SECTOR?



In recent times, Kenya has witnessed some notable developments in its mining sector. In 2016, the Mining Act replaced the old Kenya mining legislation. More so, the Companies (Beneficial Ownership Information) Regulations, 2020, is an updated modern legislation that is expected to reshape and grow the mining industry. Notwithstanding, mining productivity remains relatively low, with very few projects in a largely untapped sector¹⁷. Additionally, as of 2022 the Business Registration Service has indicated that there has been 50% compliance by entities on BO disclosure.

In October 2023 the Cabinet Secretary for Mining communicated that the government lifted the moratorium following the conclusion of a National Wide Airborne Geophysical Survey (NAGS) and the production of a preliminary report, which identified 970 mineral occurrences across the country. This would be a relief to the prospective miners but the Ministry would need to enhance the process of licensing not to dampen the optimism shared by prospective investors in the country.¹⁹

The State department has also ensured that there exists a functional Online Mining Cadastre (OMC) for transparency in the issuance of licenses. Stop orders have also been sent to about 3000 illegal operations.

It is upon the Registrar of Companies to facilitate the implementation of beneficial ownership regulations. If a company persists on not complying with reporting requirements the Registrar will send a warning notice to the firm. If a firm fails to comply, they are liable to a fine not exceeding ksh. 500,000 for each of the officer for the first offence and ksh 50,000 daily for a continued noncompliance. Nonetheless, the fact that the government has not promoted expansion of the mining sector has led to the challenge of implementing beneficial ownership in the industry.

Kenya has attempted to raise levels of beneficial ownership disclosure in mining in order to achieve more transparent governance in that sector. It is impossible to overstate the importance of beneficial ownership declarations in combating corruption, money laundering, and other types of financial malfeasance in the sector²⁰. Below is a broad summary of compliance efforts in Kenya's mining sector:

¹⁷ Alex Mathini Op. Cit

¹⁹ FIELD R, ARRUMM M, KANGETH N. Kenya's Mining Outlook ²⁰²³ – Current Status & Future Possibilities - Bowmans. Bowmans Law. ²⁰²³ [accessed ²⁰²³ Nov ³]. <https://bowmanslaw.com/insights/mining/kenyas-mining-outlook-2023-current-status-future-possibilities>

²⁰ Kianickova D. An introduction from the Kenya Ministry of Mines | Mining Digital. Mining Global. ²⁰¹⁷ [accessed ²⁰²³ Nov ³]. <https://miningdigital.com/company-reports/introduction-kenya-ministry-mines>

1. Legal Framework:

Kenya has set up an enabling legal environment that compels all mining firms, their beneficial owners and directors to release details about themselves. The Companies Act 2015 has provisions relating to beneficial ownership disclosures which require mining firms to have beneficial owners' register. The Mining Act 2016, has also provided a comprehensive framework on the ownership of the mining sector and stakeholders.

2. Reporting Requirements:

Kenyan mining companies are required to provide specific details of the firm's ownership structure and the people that eventually benefit from the mine's activities. Regulatory authorities are notified of this data.

3. Regulatory Oversight:

These requirements are supervised by the government and other relevant regulatory bodies such as the Ministry of Mining and the Kenya Revenue Authority. They may carry out audits, investigations or other measures to ensure what has been disclosed is accurate.

4. Penalties for Non-Compliance:

Failure to comply with beneficial ownership disclosure rules may incur fines as well as litigation against the company and its directors. These sanctions are meant to discourage default.

5. Public Access:

Some beneficial ownership information can be disclosed to the public encouraging more accountability and enable citizens' vigilance over mining activities.

6. International Standards:

The Kenyan government is seeking to synchronize its beneficial ownership reporting criteria with globally accepted benchmarks to satisfy the standards of international organizations such as the EITI.

7. Training and Capacity Building:

Regulatory agencies could develop training and capacity building initiatives for mining companies to better appreciate and comply with their beneficial owners' requirement.

8. Review and Amendments:

The Kenyan government regularly revises and updates its laws and regulations so as to ensure that they are still relevant in fostering transparent beneficial ownership disclosures and addressing any weaknesses or loopholes in implementing these measures.



8 | WHAT ARE THE GAPS IN BENEFICIAL OWNERSHIP IMPLEMENTATION IN THE MINING SECTOR IN KENYA?

The institutional mandate to oversee BO collection and disclosure rests with various government agencies. In Kenya compliance with the beneficial ownership disclosure road map and accurate allocation of beneficial ownership data presents a challenge. With regard to data collection, there are big variations by jurisdictions, such as the way data is evaluated, monitored, maintained, updated, and cross-referenced. It is heightened by foreign ownership and complex ownership structures. As a result, the data may contain errors, which could hamper the efforts of the authorities to locate criminals and avoid financial crimes. Therefore, strong systems and procedures should be put in place to verify data on beneficial owners.

Privacy is a concern in the revelation of beneficial ownership information because it entails gathering, retaining, and publishing private data. The beneficial owners' full names, nationality, date of birth, and residential addresses should be included in this. Transparency is important in stopping illicit activities such as money²¹ laundering and tax evasion, but one must also strike a balance with the right to privacy. This unwillingness extends to companies who are also reluctant to share their private data, an element that affects the enactment of BO regulation. This will necessitate strong data protection to ensure that information is treated according to the privacy rights of individuals.

The new regulations published under Companies (Beneficial Ownership Information) (Amendment) Regulations, 2022 in Kenya have also expanded the beneficial ownership disclosure requirements and introduced additional ones when companies are involved in public procurement and PPPs²². Companies engaging in public procurements and PPPs are required to provide detailed information concerning their beneficial owners. Some companies engage in many public procurements and PPPs at a time, and they must separate their information by contract. In addition, additional transparency requirements may also prolong the procurement process since firms have to assemble this information and validate it before they can take part in this procurement or partnership exercise.

This could consequently delay the implementation of public projects. Hence, these laws are important in enhancing transparency and deterring illegal actions, but they also pose considerable challenges for companies engaged in public procurement and PPP transactions.

²² Alex Mathini Op. Cit.



While the Business Registration Service has made progress in enforcing the beneficial ownership regulations, there are challenges with the available resources and capacity. This includes, among other things, limited staff, lack of technical competence, and funding constraints. These challenges could complicate the process of monitoring compliance and enforcement of those regulations due to the complexity of the beneficial ownership structure and the sheer number of companies that such regulations would affect.



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