

ONG'ANYA OMBO
ADVOCATES

Energy Act, 2019



About Us

Ong'anya Ombo Advocates specialises in proffering Strategic Legal Services to both natural and juristic persons in the Republic of Kenya, and beyond.

Our Contacts

Ong'anya Ombo Advocates
Windsor House, 4th Floor,
University Way/ Muindi Mbingu Street,
P.O. Box 15598 – 00400
Nairobi

e: hello@onganyaombo.com

w: www.onganyaombo.com

m: +254 703 672515

Ong'anya Ombo Advocates © 2019

Images: Pixabay

DISCLAIMER: Take note that the information herein is not intended to serve as a legal opinion or advise, and should you need any clarity or understanding of what this information is about, you are advised to seek professional advice from your legal advisor, lawyer, or the professional person that you deem fit in reference to the questions that you have. In addition, you, inclusive of your representatives, agents, assigns, or whosoever, agree that, should you rely on this information, you shall not hold us liable, be it directly or indirectly.

Energy Act, 2019

Introduction

The Energy Act No. 01 of 2019 defines energy as any source of electrical, mechanical, hydraulic, pneumatic, chemical, nuclear, or thermal power for any use; and includes electricity, petroleum, coal, geothermal, biomass and all its derivatives, municipal waste, solar, wind and tidal wave power.

Energy, in the twenty-first century, attracts a number of topical issues that touch on climate change, models of revenue distributions, the expectation of positive development, and how it will affect the locals, County and National Governments, at least as per the structure of the Republic of Kenya (Kenya). The Government of Kenya (the Government) passed and assented the Energy Act No. 01 of 2019 (Energy Act) that consolidates all the laws relating to energy in Kenya.

The Constitution, under the Fourth Schedule, provides for functions of the County and National Government. The National Government has priority rights on matters about energy. Besides, while the exploration of various energy resources might result in revenue generation for the National Government, there is the need for equitable distribution of the revenue or benefits emerging from the exploration the energy resources. Recently, in *Save Lamu & 5 others v National Environmental Management Authority (NEMA) & another* [2019] eKLR, the Petitioners raised various issues, including the aspect of how the project would negatively impact the environment. Importantly, the decision was in favour of the Petitioners. As a result, it is evident that energy exploration not only results in economic growth but can also ruffle a person's feathers.

The content herein is a summary of the Energy Act, which is meant to give relevant highlights on the new developments in regulating energy and to what extent does the Energy Act apply.

PREPARED BY:



Omba Malumbe
Partner

e: om@onganyaombo.com



J.B. Ong'anya
Managing Partner

e: jb@onganyaombo.com

Energy Policy and Integrated Energy Plan

The Government, in a bid to implement the Energy Act and other applicable Regulations, it will generate an Energy Policy that captures the needs of both Governments (County and National). The relevant stakeholders will be involved for purposes of making an Energy Policy that reflects the needs of the Government and represents the needs of Kenyans.

The concerned Cabinet Secretary (CS) will come up with the necessary regulations that will guide the way forward on how to develop energy plans. Further, the CS will prepare a National Energy Plan that will be under review every five years upon its publication. The Government, while developing all these, will consider its primary mandate, which includes providing affordable energy to all persons in Kenya, and promotion of various energy investment portfolios.

National Energy Entities

As mentioned earlier on, the Energy Act is a consolidation of various legislations that address matters on energy. Therefore, the Energy Act distinguishes multiple bodies that will address various categories on energy. The National Energy Entities (NEE) are the *Energy and Petroleum Regulatory Authority (EPRA)*; *Energy and Petroleum Tribunal (EPT)*; *Rural Electrification and Renewable Energy Corporation (REREC)*; *Nuclear Power and Energy Agency (NPEA)*, among others to be highlighted later on in the write-up.

EPRA has the characteristics of a company and will operate independently. It will regulate all matters pertaining to generation, importation, exploration, transmission, distribution, supply, and use of electrical energy. Also, it will monitor the production, conversion, distribution, supply, marketing, and use of renewable energy; and exploration, extraction, production, processing, transportation, storage exportation, importation, and sale of coal bed methane gas and other energy forms. However, it will not address anything pertaining to the leasing of nuclear facilities; and importation, refining, exploration, transportation, storage or sale crude oil.

EPRA's authority will extend to reviewing specific contracts, machines, developing guidelines, issuance of permits or licenses, data collection, enforce local content, coordination, among others. All these will be for purposes of achieving its objectives as confined by the laws or relevant regulations. EPRA, through its Committees or Agents, may upon producing evidence of their identification, be allowed to inspect, review, or run any necessary tests on the facilities.

EPRA will have its internal quasi-judicial bodies to address disputes; it will make its decision within sixty days from the date of making that application. Thereafter, within seven days upon making the decision, it will share its decision with the parties. In the event of these terms not being adhered to by EPRA, one can appeal within seven days upon the lapse of sixty days from the date of lodging the application. However, when the decision is rendered, and a party is aggrieved, the party may appeal the decision within thirty days upon receipt of the decision.

EPT will have a maximum of seven members, and will always form a quorum when three members are present. It is a condition that among the three members, the Chairperson must be present or at least the Vice-Chairperson, when the Chairperson is absent.

The EPT will have jurisdiction over civil matters between a licensee and a third party or a licensee, and it will have appellate jurisdiction over decisions rendered by the EPRA or any licensing body. EPT can review its own decision on its own motion or upon a party making such an application. It will have the authority to issue reliefs, including injunctions, penalties, damages, order specific performance. However, EPT will not have jurisdiction over any criminal matters.

Any person aggrieved by the decision of the EPT may file an appeal to the High Court within thirty days from the date of the decision or order.

REREC, a body corporate, will oversee the implementation, management, sourcing of funds, developing or updating master plans, support, establishing a framework for collaboration with County Governments, undertaking of feasibility tests, promotion, collaboration, formulation of national strategy, among other activities concerning renewable energy and rural electrification.

REREC will work together with County Governments, the NPEA, among others for purposes of ensuring that the purpose of achieving high use of renewable energy and that rural electrification is achieved.

NPEA, a body corporate, will have its headquarters in Nairobi. Its primary mandate is to effect Research and Development (R&D) and the development of a nuclear electricity generation plant in Kenya. In addition to its primary mandate, NPEA will come up with or propose necessary policies and legislations, collaborate with various entities, advise where appropriate, provide room for locals to specialise in nuclear energy, development or production of local technologies, among others in a bid to meet its legislative mandate.

Renewable Energy

The Energy Act provides that all unexploited renewable energy resources whether under or in any land vests in the National Government subject to any law or rights founded in law. The Energy Act requires the relevant CS to, within 12 months upon coming to effect of the Energy Act, commence a countrywide survey to map out locations with renewable energy resources.

The Government, through the CS, will promote the utilisation of renewable energy resources such as biomass, biodiesel, bioethanol, charcoal, fuelwood, solar, wind, tidal waves, hydropower, biogas, and municipal waste. To achieve its purpose, it will require the CS to work independently or in collaboration with other entities. It will include strategy formulation, providing necessary frameworks, how to directly link electricity to the National Grid, adopt the use of fast maturing trees for energy production, among others.

The Renewable Energy Resource Advisory Committee (**RERAC**) will be an inter-ministerial Committee that will be composed of representatives from the Ministry of Energy, REREC,

Geothermal Development Company Limited, Kenya Electricity Generating Company Limited, the Attorney General, National Treasury, and someone from the body dealing with Natural Resources. However, when necessary, the RERAC will incorporate other members to a maximum of four.

RERAC will advise the CS on the criteria for allocation, licensing, management and development of renewable energy resources areas; management of water towers and catchment areas; and development of policies and projects that will enhance the efficient use of water resources. Further, RERAC is at the disposal of the County Government should the County Government need any advise on renewable energy resources.

Geothermal Resources

For a person to initiate any process on the industrial or commercial use of geothermal, there must be authority or license issued to that effect by the National Government – upon paying the subscription fee and meeting condition precedent. The authorisation or licensing extends to a person who intends to search for geothermal resources.

The authorisation granted to search for geothermal resources at a specified location is not transferable – save where the CS issues a consent – and will last two years. However, where there is a need for more time, the authorisation will be extended for one year from the date of expiration or expiration of the renewal. It is imperative to note that the authorisation is not absolute as the CS can revoke it, and where there is a license, it can be forfeited where the licensee fails to meet statutory conditions or those as advised by the RERAC.

The CS, in consultation with RERAC, will issue a geothermal resource license that can allow a person to explore the geothermal resource within a whole block or specific part of the block. It is imperative to note that the extraction will need to meet various conditions, including Article 71 of the Constitution, the license will not exceed thirty years. The license, upon expiry, it may be renewed, as is or on new terms, for a period not exceeding five years upon expiry or after the initial renewal.

In the event of a rejection, which will be as advised by RERAC, the reasons will be shared with the applicant within fourteen days. The applicant, whose application has been rejected, will have the option to appeal at the EPT within thirty days upon receipt of the decision. If dissatisfied by the EPT decision, the aggrieved applicant can appeal to the High Court, which is expected to hear and determine the matter within a period of one hundred and twenty days. If the event the High Court fails to do so within the stipulated period, the EPT decision will be final.

A person who secures a geothermal exploration license attains various rights under that license. Therefore, the licensee will have the right to enter the land to sink a well and extract the geothermal; drill and construct; erect, build and maintain buildings for oneself or employees; develop or maintain a plant; utilise the geothermal resources; use water within the limits of the law; and construct and maintain roads, among other models of communication.

If in the event of exploration, and the licensee comes across other by-products that are regulated by the laws, the licensee may proceed to explore the by-products or minerals upon acquiring a license. Therefore, the licensee is required to inform the CS within seven days of the discovery.

The licensee will pay a Royalty fee of between one per centum to two and a half per centum of the value of the geothermal energy produced from such resources for the first ten years. Thereafter, two per centum to five per centum of the value of the geothermal energy produced each year after the tenth year. However, the Royalty fee per centum will not be applied to geothermal energy that is dissipated before it reaches the point of delivery to the purchaser. It is important to note that all relevant deductions will be made before determining the value of geothermal energy.

The National Government will be the recipient of the Royalty fee, which will be paid to the Treasury of the National Government. After that, the County Government and the locals will receive twenty percent and five percent, respectively. However, the Energy Act provides Parliament with authority to revise the percentage to be issued to the County Government and locals without necessarily amending the Energy Act.

The Energy Act provides for penalties for any activity that offends its provisions:

In the event one intends to engage in any activity that involves or surrounds the search or exploration of geothermal resources for industrial or commercial use without the authorisation will be fined not less than Kenya Shillings One Million or, if a continuing offence, the initial fine will apply and Kenya Shillings One Hundred Thousand for every day or part of the day the offence continues.

A person who tampers with any survey pegs or beacons placed as per the survey conducted under the Energy Act; or valve or instrument being used in connection with any such survey, any well or geothermal generation power plans or steam highways commits an offence. If convicted, the person will be fined a figure of not more than Kenya Shillings One Million or the initial fine and Kenya Shillings One Hundred Thousand for every day or part of the day the offence continues up to a maximum of thirty days or imprisonment term not exceeding twelve months or both.

Renewable Energy Feed-in Tariff System

The Energy Act requires that there will be established a renewable energy feed-in-tariff system that will enhance the generation of electricity from renewable energy resources; reduce the long-



distance distribution of electricity; stimulate the use and innovation in renewable energy resources; and reduce greenhouse gas. CS may make regulations upon receiving recommendations from the EPRA on how to administer and implement the Feed-in-Tariff System.

Downstream Coal

For one to produce energy from coal, generate electricity using coal, or transport coal for energy production, the person will need a license or permit from the EPRA. In the event of infringement, it will result in fines or imprisonment or both.

An application to attain a license, permit or certificate will be considered within thirty days. In the event there is a rejection, the EPRA will provide reasons for the refusal. It is essential that anyone who is renewing their licenses to lodge it at least thirty days before expiration. If the EPRA does not assess the application to renew within the thirty days, the initial license will be deemed operational until EPRA renders its decision. However, if EPRA is of the view that there was any infringement, EPRA will penalise the applicant a penalty equivalent to fifty percent of the license or permit fee.

A person may apply to the EPRA to have the current license amended, and in the event of a rejection, reasons ought to be given. Also, the license or permit issued by EPRA is not absolute as it can suspend or revoke the license or permit – the cancellation can be automatic or there will be room for one to explain oneself.

The Energy Act's provisions on Downstream Coal provide that a person who intends to construct a facility that produces energy using coal will have to seek EPRA's authorisation. While applying, one will need to disclose the name and address of the owner, proposed beneficial owner, plans and specifications by an engineer, Strategic Environment Assessment and Social Impact Assessment licenses, and any other necessary information.

There will be common use of facilities, particularly where a license is issued to a person to operate a Common User Facility. The person will provide indiscriminative open access to its facility to any licensee or a person on payment of fair and reasonable charges as will be regulated.

Electrical Energy

Licensing

A person who is interested in carrying out the generation, exportation, importation, transmission, distribution and retail supply of electricity must acquire a license from EPRA. However, where one is generating electrical energy for own use and does not exceed one megawatt, it will not need EPRA's authorisation. Failure to comply will result in a fine of not less than Kenya Shillings One Million or a prison term of not less than a year or both, upon conviction.

All applications or amendments will be effected through a fair, open and competitive means. Therefore, a person intending to acquire a license will make a fifteen days' notice by public advertisement in at least two newspapers of nationwide circulation. Also, there will be room for anyone that will find it necessary to make any representation or objection on any application by a person to acquire a license.

In fifteen days upon receipt of the application, EPRA will confirm whether the application is complete. Further, where there is any request for representation or objection, EPRA will initiate communication in no less than fifteen days and EPRA's decision will be made within thirty days

after the hearing. Regardless of the issues about the representation or objection, EPRA is required to make its final decision within sixty days upon confirming that the application is complete. In the event of a rejection, the aggrieved party is at liberty to appeal to the EPT within thirty days of the decision by EPRA.

It is imperative to appreciate that the license is appended with various conditions including adherence to applicable environmental, health and safety laws; contractual and tort liability; and payment of license fees will be paid on a timely basis.

The aspect of Sector-Specific Competition Law/ Anti-Trust Law is provided for under the Energy Act, whereby a licensee cannot acquire any business supplying electrical energy under any license unless EPRA issues such consent. Failure to adhere to this provision will result in revocation of the license granted, among other options as EPRA may provide.

The license is not subject to any transfer; however, the transfer can only take place upon approval by EPRA. Also, when a license is lost, destroyed or defaced, EPRA will issue a duplicate of the license at a fee.

Electricity Generation

A license issued under this bracket allows the licensee to operate the generating station or plant as per the license, and connect to the distribution or transmission network. Also, the licensee will be required to adhere to the laws touching on development, building, operating or maintaining the business or plant. Meanwhile, hydroelectric projects will require further intensive review.

Transmission of Electrical Energy

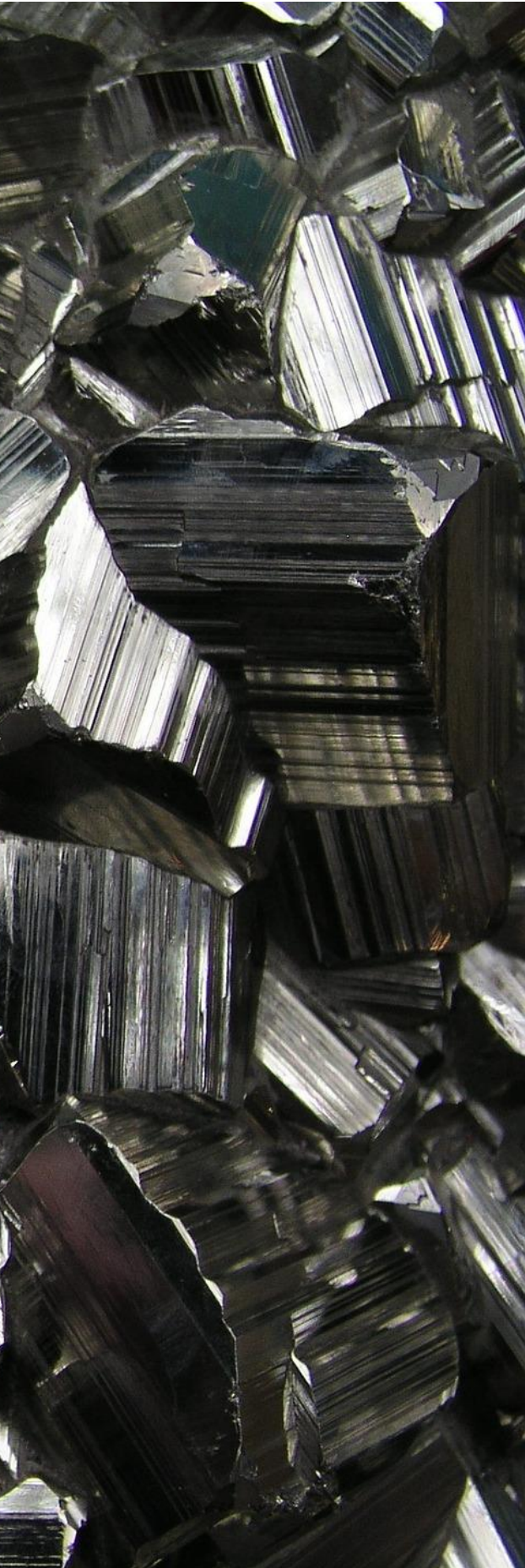
The license on the transmission of electrical energy requires the licensee to operate a transmission network and connect to its transmission network or another network, whether in or outside Kenya – according to the license. Further, the license means the licensee will take care of the project including the transmission grid.

Transmission licensee will build, maintain and operate an efficient project; comply with directions of system operator; allow indiscriminate common user rights as under the law; and provide any needed information. Further, as per the license, the licensee ought to make its system capable of handling the capacity being connected to its transmission grid.

The EPRA may appoint the System Operator for purposes of matching consumer's requirements or demand with electrical energy availability or supply, maintaining electric power system security, and arranging for the dispatch process.

Distribution of Electrical Energy

This license will allow the licensee to plan, build, operate and maintain the distribution system necessary for the transmission of electrical energy from the source or plant either directly or through a transmission system to reach the consumers. The government or licensee may have built the distribution system.



The licensee is required to provide efficient and an economical distributions system; adhere to indiscriminative Common User access to the distribution system as per the law; and provide all needed information to enable EPRA to make an informed decision.

The licensee will liaise with the authorised retailer for purposes of enabling consumers within its area to access the electrical energy. However, if there is no authorised retailer, the person will make an application to the licensee who is expected to plan and construct the requisite electric supply lines.

Rural Electrification

The Energy Act requires the establishment of a Rural Electrification Programme Fund that will accelerate electricity infrastructure in the Country. The funds will include electricity levy as per s 114, money appropriated by Parliament, donations, grants, loans, interest on bank deposit, and any other amount lawfully received.

Retail Supply of Electricity

The license will allow a person to supply electricity to consumers through various commercial models such as procuring energy from other licensees, an inspection of premises, metering, selling, billing, and collecting revenue. To acquire the license, EPRA will provide the bare minimum that an applicant must meet – it will touch on financial and technical requirements.

Where a licensee agrees to supply the energy to a customer, yet the customer was receiving the services from a different supplier, the new licensee will assume all the responsibilities and the initial or previous contract will cease immediately.

Electrical Installation Work

The Energy Act requires that a person will only offer electrical installation services if the person is licensed as an electrical contractor by the EPRA. To acquire the electrical contractor license, one will need to be a certified electrical worker or, if an employer, have an employee who is a certified electrical worker.

A person who wishes to be a certified electrical worker will make an application in the prescribed form to the EPRA, which shall issue a certificate (with or without conditions) to the applicant within sixty days after making the application and administering the relevant tests. If the application is rejected, the person can appeal within thirty days to the EPT.

Equally, to attain a license as an electrical contractor, one will make an application in the prescribed form to the EPRA, which will grant license (with or without conditions) to the applicant within thirty days after making the application. If the application is rejected, the person can appeal within thirty days to the EPT.

Metering of Electrical Energy

The meters in use will comply with the set conditions by the Kenya Bureau of Standards, and each licensee will have their respective meters sealed with an approved seal bearing the licensee's distinctive brand or mark impressed on it. The consumer is allowed to provide its own meter and expected to take all necessary measures to take care of the meter's conditions. Further, the customer is entitled to install in its premises a check meter or meters.

Right of Way, Wayleaves and use of Land for Energy Resources and Infrastructure

A person may develop energy infrastructure on, through, over or under any public, community or private land subject to the Energy Act and any relevant law. For purposes of the Energy Act, energy infrastructure includes electric supply lines, petroleum or gas pipelines, geothermal or coal infrastructure.

If there is a need to effect the purposes of this part of the law, the licensee will seek permission from the owner, who is expected not to withhold the consent unreasonably. However, where the owner cannot be traced, the licensee will have to make public advertisements in at least two newspapers of nationwide circulation and announcement in a radio station of local coverage for two weeks.

Where a person's land is being considered for purposes of the intended projects', the person will be reasonably compensated as required by the law. In certain instances where the land is not acquired in total, specific applicable prohibitions will be effected; therefore, limiting the owner of the property from doing certain activities.

Energy Efficiency and Conservation

EPRA is required to coordinate the development and implement a reasonable National energy efficiency and conservation programme. In doing so, EPRA will classify various factories, buildings and energy appliances based on energy efficiency and conservation. Therefore, in certain instances, various factories will provide detailed information concerning their energy consumption for purposes of EPRA to assess whether it is in line with its National energy efficiency and conservation programme.

Provisions Relating to National Government

EPRA, upon making recommendations to the CS, the CS will proceed to make regulations on processes and energy consumption standards for any equipment; classify equipment or appliances; prohibit certain equipment or appliance save where it conforms with the set standards. The prohibitions will be given based on a set of authoritative guides on timelines.

The CS, through the regulations, will require the display of specific labels; categorise users of energy in various groups; establish and prescribe energy consumptions standards; codes; minimum qualifications for energy auditors and managers; codes to be adhered to by consumers, among others.

Provisions Relating to County Governments

A County Government, after the approval of the EPRA, will amend the energy conservation building codes to suit the local climatic conditions and may, provide the suitable applicable codes; enforce codes set for purposes of efficient use of energy and conservation; create awareness programmes; train personnel and specialists in the relevant techniques; encourage preferential use of energy; and what to be considered during inspection. Further the County Government has power to give directions on regulations or norms for process and energy consumption standards in any industry or building or building complex; or the energy consumption standards for equipment and appliances.

Also, it will develop a Fund that will be for the promotion of efficient use of energy and its conservation within the county.

Penalties and Adjudication under Energy Efficiency and Conservation

In the event, a party is aggrieved by the decision of the Governments or body under the Energy Act can prefer an appeal at the EPT within the required timeframe.

The National and County Government have been engulfed with authority to provide various regulations and rules respectively for purposes of enhancing the implementation of the Energy Act. These regulations will address matters such as various energy consumptions norms and standards; time and intervals of conducting energy audit; particulars to appear on the label; conducting inspection; holding an inquiry, among others. The rules, which will be generated by the County Government, will address energy efficiency and conservation building codes; matters included for purposes of the inspection; a person or any authority that will administer the Funds; and any other matter confined under the County Government.

EPRA will come up with energy efficiency and conservation programmes that will be effected through civic education, promote and facilitate the implementation of energy-efficient projects, identify various available technologies and facilitate deployment for improving efficiency, energy labelling programmes, among others. It will also establish energy consumption benchmarks to be complied with by all energy consumers.

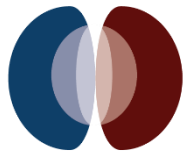
Miscellaneous Provisions

The Energy Act provides that any person carrying out any activity as under the Energy Act will be required to adhere to the local content requirements. As a result, a person is required to prepare and submit an annual and long-term local content plan, which will be subject to EPRA's approval. Generally, consideration will be towards services provided within the County and goods manufactured in the Country, if the goods meet the required standards; Kenyans who are qualified for a given placement are given priority in all levels of the value chain; and transfer of knowledge to Kenyans is imperative.

The local content requirement extends to employment and training; R&D; technology transfer; industrial attachment and apprenticeship. About services, it will factor legal, financial, insurance, consultancy, construction, hospitality, transport, security, clearing and forwarding or inspection services.

In making sure the adherence of the local content requirements, EPRA will set the bare minimum conditions among other applicable terms as it will have the right to monitor the implementation of the local content regulations or rules. Where EPRA requires certain information from the persons licensed or having permits to operate under the Energy Act for various legal reasons, the information will be held in confidence.





ONG'ANYA OMBO
ADVOCATES

4th, Windsor House,
Junction at University Way and Muindi Mbingu Street,
P.O. Box 15598 – 00400
Nairobi, KENYA.
Office: +254 703 672 515

e: hello@onganyaombo.com
w: www.onganyaombo.com