

KENYA'S CONSTITUTION. It was promulgated on 27 August 2010, and became the supreme legislation of Kenya. This document contains eighteen chapters and six Schedules, where the chapters elaborate on the following issues which are important in this course:

Art 2 - sovereignty of the people and supremacy of the constitution;

Art 42 - the bill of rights on environmental issues;

Art 60 – 73 land and environment;

Rights and Fundamental Freedoms Environmental rights and freedoms are presented in Article 42 of the new constitution, which states: *Every person has the right to a clean and healthy environment, which includes the right – (a) To have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 69; and (b) To have obligations relating to the environment fulfilled under Article 70.*

The right to a clean and healthy environment was merely implied in the previous (1964) constitution under the 'right to life' (Section 71) since the constitution did not contain explicit environmental provisions. The improvement made in the new (2010) constitution is first and foremost, the statement that a clean and healthy environment is everyone's right, as well as further elaboration on what exactly is meant when conferring this right.

The right to a clean and healthy environment is acknowledged in the Environmental Management and Coordination Act of 1999. The elevation of this Environmental right to constitutional status has only been achieved in the new constitution. Environment and Natural Resources These are elaborated in Chapter Five, titled 'Land and Environment' which consists of two parts, the first dedicated to land, and the second to environment and natural resources. The second part, the main focus of this paper, is titled 'Environment and Natural Resources' and consists of four Articles detailing obligations, enforcement, agreements and legislation relating to the environment.

### **Obligations in Respect of the Environment: Sustainable Environmental Management**

These obligations are found in Article 69, which consists of two parts and provides guidance to the State on its role in sustainable management of the environment in Kenya. The commonly used definition of 'sustainable development' is derived from the 1983 United Nations World Commission on Environment and Development (WCED), which produced the Brundtland Report (named after the Chairman) and also referred to as 'Our Common Future'.

Article 69 (a) of the new constitution, by stating 'The State shall ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits', IT acknowledges the role of the state in ensuring sustainable development as well as the importance of equitably sharing benefits derived from the environment.

## **Tree Cover Forests in Kenya,**

like those elsewhere in the world, are unique in their contribution to environmental balance, as well as economic and socio-cultural functions. Nonetheless, they are victim to increasing demand for products and services, competition with other land uses, and poor governance.<sup>19</sup> Kenya's present forest cover is equivalent to 5.9 per cent of land area, which is inadequate to significantly contribute to the national economy while fulfilling environmental and socio-cultural functions. The Kenya Forest Services, in its Strategic Plan 2009-2013, proposes to sustainably manage the forests through the combined use of ecological, economic and social approaches, guided by the Forest Act No. 7 of 2005, and in cooperation with the relevant institutions, including the Ministry of Forestry and Wildlife.

**Sec 48 of EMCA** outlines the procedure regarding registration of forests. At sec 22 Specifically, the Director General of the National Environment Management Authority (NEMA) and the Chief Conservator of Forests, following consultations, may enter into contractual arrangements with private owners for registration of land as forest land. The same provision also requires these two authorities to ensure that the traditional interests of local communities with regard to these forests are not jeopardised.

**Article 69 (b) of the constitution** states that 'The State shall work to achieve and maintain a tree cover Law, Environment and Development Journal 80 13 Kenya, Environmental Management and Coordination Act, EMCA (Act No 8 of 1999, Kenya Gazette Supplement No. 3, Acts No. 1, January 2000) of at least ten per cent of the land area of Kenya which is a recognition of the obligation of the State and its organs, including the Ministry of Forestry and Wildlife and the Kenya Forest Service, to ensure that the present forest cover is increased, so as to adequately meet the needs placed upon forests in Kenya. The protection of the traditional interests of local communities is provided for in the subsequent article of the new constitution, and not presented in a combined manner as was done in EMCA. This revision acknowledges that traditional interests are not only tied to protected areas like forests, but are important in their own right.

Intellectual Property and Indigenous Knowledge Modern scientific knowledge has been credited with the destruction of complex ecological systems, in part due to its separation of humans from the natural world.

Previously, EMCA provided for the traditional interests of local communities in Article 43, 28 which required the Minister to notify in the Gazette the traditional interests of local communities as relates to specific natural resources. The present constitution, in Article 69 (c), is more explicit. It states that The State shall protect and enhance intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities. This safeguards indigenous knowledge systems and acknowledges their role in the conservation of biological diversity.

Environmental Impact Assessment, Audit and Monitoring Environmental Impact Assessment (EIA) is one of the most well known tools for environmental assessment. Prior to the establishment of legislation specific to EIA in Kenya, the impact of development projects on the environment was assessed using 77 sectoral policies and laws. Guidelines and procedures established by international organizations also guided the EIA process. EMCA was the first legislation to formally define EIA within the Kenyan context, as well as to establish procedures and supporting institutions for EIA. This was followed by the Environmental Impact Assessment and Audit Regulations of 2003 (EIAAR). Together, these two legislation form the basis of EIA in Kenya. In addition, NEMA, the different levels of public participation have been acknowledged, each with its merits and demerits. Notably, the Government of Kenya (Government) acknowledges the role of public participation in democratic governance<sup>34</sup> and sustainable development. Article 69 (d) of the new constitution, which states that *The State shall encourage public participation in the management, protection and conservation of the environment*<sup>35</sup> this demonstrates Kenya's commitment to public participation, as well as reiterates the responsibility to ensure that public participation serves the purposes for which it is intended.

Genetic Resources and Biological Diversity Kenya ratified the Convention on Biological Diversity (CBD) of 1992 in 1994, and thereafter established the National Biodiversity Strategy and Action Plan (NBSAP) to address the requirements of the CBD through the then Ministry of Environment and Natural Resources. Kenya's biological resources are diverse, with 80 per cent of the population depending on them for livelihood; yet management of these resources is weak. In spite of the provisions outlined in the EMCA for an inventory of biological diversity and specific conservation measures, including in situ conservation, adequate information on the non-consumptive values of resources is lacking, and there is limited access to biodiversity data and information and low levels of adoption of new technologies, including biotechnology. Consequently, plant and animal species are overexploited, resulting in genetic erosion and endangering of rare species. The Ministry of Environment and Mineral Resources (Ministry) is currently charged with coordination of all environmental matters in the country. Through Article 69 (e) of the constitution which states Law,

### **Threats to Environmental Integrity**

Kenya faces a dilemma presented to all countries in their quest for development: ensuring that development is sustainable. Unfortunately, Kenya's economic growth has been associated with environmental degradation and pollution, including declining forest area; decreased wetlands; falling wildlife numbers; water and land shortage; rapid depletion of renewable and non-renewable natural resources; increased use of toxic chemicals; and discharge of waste and effluent into water, soil and air.<sup>49</sup> Other significant threats to the environment arise from poverty, overpopulation, climate change, political insecurity, pollution and unregulated bioprospecting.

In spite of the threats to the environment mentioned above, Kenya's economy is largely dependent on the environment, through activities such as agriculture, fisheries, mining, and the timber industry. As a result of environmental degradation due to these activities, Kenya continues to incur high costs including foregone opportunities, preventive/avertive expenditure, replacement costs, externalities and foregone future opportunities. The country's Vision 2030 has proposed specific strategies to protect the environment. They include: promoting environmental conservation; improving pollution and waste management through the design and application of economic incentives; commissioning of public-private partnerships (PPPs) for improved efficiency in water and sanitation delivery; enhancing disaster preparedness in all disaster-prone areas; and improving the capacity for adaptation to global climate change. By stating in Article 69 (g) of the new constitution that 'The State shall eliminate processes and activities that are likely to endanger the environment', a commitment is made to ensure that Kenya's continuing development does not compromise the foundation on which it is based.

**Benefits of the Environment to Citizens.** Kenya is well endowed with resources, including natural resources that comprise both physical and biological resources. Physical resources include land, water, minerals, and energy, and biological resources include forests, fish and wildlife. These resources are distributed throughout the country, and most of them are being utilised to support Kenya's economy, to the extent that Kenya is considered the largest economy in East Africa. For example, agriculture has been estimated to contribute 23.8 per cent of GDP and tourism brought. This has been largely due to the Government's continued investment in already developed areas, so as to achieve faster economic growth, contributions to the national economy through meat and livestock products; support tourism through the location of game reserves and national parks; have potential for solar and wind energy; contain mineral resources including sand, gravel, soda ash, gum, resins, and gemstones; provide habitat for medicinal plants; are associated with communities rich in indigenous knowledge of managing climate variability; and are characterized by expansive land that is available for further economic development of the entire country.

### **Individual Commitment to Environmental Management**

The second part of Article 69 of the new constitution states: *'Every person has a duty to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources.'* This can be viewed as confirmation by the State of its commitment to sustainable management, and the expectation of support, in the execution of these activities, from its citizens.

**Enforcement of Environmental Rights Article 70** of the constitution deals with the enforcement of environmental rights and it consists of three parts. The first part states: If a person alleges that a right to a clean and healthy environment recognised and

protected under Article 42 has been is being or is likely to be, denied, violated, infringed or threatened, the person may apply to a court for redress in addition to any other legal remedies that are available in respect to the same matter. The second part of Article 70 states: On application under clause (1), the court may make any order, or give any directions, it considers appropriate – (a) To prevent, stop or discontinue any act or omission that is harmful to the environment; The third part of Article 70 states: ‘For the purposes of this Article, an applicant does not have to demonstrate that any person has incurred loss or suffered injury’. The ability of citizens to apply to a court for redress on environmental issues, whether affected directly or indirectly, has been acknowledged as one of the great innovations of EMCA.<sup>65</sup> Specifically,

The establishment of the Public Complaints Committee in to address environmental grievances was instrumental in realizing this. These two institutions were established to provide the link between environmental management and the judiciary. For example, the Public Complaints Committee is chaired by a person qualified for appointment as a judge of the High Court of Kenya, and other members include a representative of the Attorney General, a representative of the Law Society of Kenya, a representative of NGOs, a representative of the business community, and two members appointed for their active role in environmental management. The National Environment Tribunal is chaired by a person qualified for appointment as a judge of the High Court of Kenya, and other members include an advocate of the High Court of Kenya nominated by the Law Society of Kenya, a lawyer with professional qualifications in environmental law and two persons with demonstrated competence in environmental management. <sup>66</sup> The existence of these institutions will facilitate enforcement of the new constitution as well as provide the necessary foundation for the enforcement of additional environmental legislation.

### **Agreements Relating to Natural Resources**

Article 2 (6) of the new constitution states that ‘Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution’.<sup>67</sup> Article 71 thereafter expounds on agreements relating to natural resources, and consists of two parts. The first part states: A transaction is subject to ratification by Parliament if it – (a) Involves the grant of a right or concession by or on behalf of any person, including the national government, to another person for the exploitation of any natural resource of Kenya; and (b) Is entered into on or after the effective date.

Article 71 of the new constitution subjects the exploitation of natural resources to further scrutiny by Parliament, thereby increasing control on the use of natural resources in the country. The second part states: ‘Parliament shall enact legislation to give full effect to the provisions of this Part.’

## SYSTEM OF COURTS

The system of courts is presented under Chapter Ten, titled 'Judiciary', and consists of two parts: the first dealing with judicial authority and legal system, and the second dealing with superior courts. Under the first part, 'System of Courts' is presented in Article 162(2), and states: Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land.

The above provision enables the enforcement of environmental rights, as elaborated in Article 70. In establishing environmental courts with the status of the High Court, which is designated as a superior court, the new constitution demonstrates prioritisation of environmental issues. The designation of environmental courts with the status of the High Court also ensures that there is no conflict with existing institutions, that is, the Public Complaints Committee and the National Environment Tribunal, which exist at a similar level, in the enforcement of environmental rights.

**Environmental Law and the Environmental Management and Co-ordination Act No. 8 of 1999 (EMCA) at Sec 3** provides for the Entitlement to a clean and healthy environment (extract below)

- (1) Every person in Kenya is entitled to a clean and healthy environment in accordance with the Constitution and relevant laws and has the duty to safeguard and enhance the environment.
- (2) The entitlement to a clean and healthy environment under subsection (1) includes the access by any person in Kenya to the various public elements or segments of the environment for recreational, educational, health, spiritual and cultural purposes.
- (2A) Every person shall cooperate with state organs to protect and conserve the environment and to ensure the ecological sustainable development and use of natural resources.
- (3) If a person alleges that the right to a clean and healthy environment has been, is being or is likely to be denied, violated, infringed or threatened, in relation to him, then without prejudice to any other action with respect to the same matter which is lawfully available, that person may on his behalf or on behalf of a group or class of persons, members of an association or in the public interest may apply to the Environment and Land Court for redress and the Environment and Land Court may make such orders, issue such writs or give such directions as it may deem appropriate to—
  - (a) prevent, stop or discontinue any act or omission deleterious to the environment;

- (b) compel any public officer to take measures to prevent or discontinue any act or omission deleterious to the environment;
  - (c) require that any on-going activity be subjected to an environment audit in accordance with the provisions of this Act;
  - (d) compel the persons responsible for the environmental degradation to restore the degraded environment as far as practicable to its immediate condition prior to the damage; and
  - (e) provide compensation for any victim of pollution and the cost of beneficial uses lost as a result of an act of pollution and other losses that are connected with or incidental to the foregoing.
- (4) A person proceeding under subsection (3) of this section shall have the capacity to bring an action notwithstanding that such a person cannot show that the defendant's act or omission has caused or is likely to cause him any personal loss or injury provided that such action—
- (a) is not frivolous or vexatious; or
  - (b) is not an abuse of the court process.
- (5) In exercising the jurisdiction conferred upon it under subsection (3), the Environment and Land Court shall be guided by the following principles of sustainable development—
- (a) the principle of public participation in the development of policies, plans and processes for the management of the environment;
  - (b) the cultural and social principles traditionally applied by any community in Kenya for the management of the environment or natural resources in so far as the same are relevant and are not repugnant to justice and morality or inconsistent with any written law;
  - (c) the principle of international co-operation in the management of environmental resources shared by two or more states;
  - (d) the principles of intergenerational and intragenerational equity;
  - (e) the polluter-pays principle; and

**The Establishment** The National Environment Management Authority (NEMA).

Its established under the Environmental Management and Co-ordination Act No. 8 of 1999 (EMCA) as the principal instrument of Government for the implementation of all policies relating to environment. EMCA 1999 was enacted against a backdrop of 78 sectoral laws dealing with various components of the environment, the deteriorating state of Kenya's environment, as well as increasing social and economic inequalities, the

combined effect of which negatively impacted on the environment. The supreme objective underlying the enactment of EMCA 1999 was to bring harmony in the management of the country's environment.

### **Mandate of NEMA**

Section 9 (i) of EMCA mandates the Authority to exercise general supervision and coordination over all matters relating to the environment and to be the principal instrument of the Government of Kenya in the implementation of all policies relating to the environment.

The Authority is a Semi-Autonomous Government Agency (SAGA) in the Ministry of Environment, Water and Natural Resources and has been in operation since 1st July 2002. The Authority works closely with lead agencies and development partners, the latter who include UNEP, UNDP and DANIDA. Since its establishment NEMA has implemented three strategic plans and has been on performance contracting as required by the State Corporation (performance contracting) Regulations, 2004 legal notice No. 93. Under these regulations, Boards of Directors in state corporations, among others, are required to sign performance contracts with the Government, against which they are periodically evaluated.

### **The Authority core functions are:**

- Coordinating the various environmental management activities being undertaken by the lead agencies.
- 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 sustainable yield basis, for the improvement of the quality of human life in Kenya.
- To take stock of the natural resources in Kenya and their utilization and conservation.
- To establish and review land use guidelines.
- Examine land use patterns to determine their impact on the quality and quantity of natural resources.
- Carry out surveys, which will assist in the proper management and conservation of the environment.
- Advise the Government on legislative and other measures for the management of the environment or the implementation of relevant international conventions, treaties and agreements.
- Advise the Government on regional and international conventions, treaties and agreements to which Kenya should be a party and follow up the implementation of such agreements.

- Undertake and coordinate research, investigation and surveys, collect, collate and disseminate information on the findings of such research, investigations or surveys.
- Mobilize and monitor the use of financial and human resources for environmental management.
- Identify projects and programmes for which environmental audit or environmental monitoring must be conducted under this Act.
- Initiate and evolve procedures and safeguards for the prevention of accidents, which may cause environmental degradation and evolve remedial measures where accidents occur e.g. floods, landslides and oil spills.
- 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. Management objectives must be adhered to and adequate early warning on impending environmental emergencies is given.
- Undertake, in cooperation with relevant lead agencies, programmes intended to enhance environmental education and public awareness, about the need for sound environmental management, as well as for enlisting public support and encouraging the effort made by other entities in that regard.

## **WHAT IS EIA?**

Environmental Impact Assessment (EIA) is a critical examination of the effects of a project on the environment. An EIA identifies both negative and positive impacts of any development activity or project, how it affects people, their property and the environment. EIA also identifies measures to mitigate the negative impacts, while maximizing on the positive ones. EIA is basically a preventive process. It seeks to minimize adverse impacts on the environment and reduces risks. If a proper EIA is carried out, then the safety of the environment can be properly managed at all stages of a project- planning, design, construction, operation, monitoring and evaluation as well as decommissioning.

## **ENVIRONMENT IMPACT ASSESSMENT**

### **EIA, WHAT FOR?**

The goal of an EIA is to ensure that decisions on proposed projects and activities are environmentally sustainable.

### **WHY AN EIA?**

**EIA is conducted in order to: -**

- a) Identify impacts of a project on the environment
- b) Predict likely changes on the environment as a result of the development
- c) Evaluate the impacts of the various alternatives on the project
- d) Propose mitigation measures for the significant negative impacts of the project on the environment.
- e) Generate baseline data for monitoring and evaluating impacts, including

mitigation measures during the project cycle.

f) Highlight environment issues with a view to guiding policy makers, planners, stakeholders and government agencies to make environmentally and economically sustainable decisions.

### **WHICH PROJECTS REQUIRE EIA?**

The projects to be subjected to EIA are specified in the Second Schedule of EMCA 1999, and include. Major developments in biotechnology including the introduction and testing of genetically modified organisms.

### **WHEN SHOULD AN EIA BE DONE?**

EIA is part of the project development process and is usually done at the initial stages of the project development. It is a decision making tool and should guide whether a project should be implemented, abandoned or modified prior to implementation.

### **EIA AS A LEGAL REQUIREMENT**

a) A proponent or investor shall not implement a project likely to have a negative environmental impact, or for which an EIA is required by the Environmental Management and Coordination Act or regulations issued under it unless an EIA has been concluded and approved in accordance with the law.

b) No licensing authority under any law in force in Kenya shall issue a trading, commercial or development permit or license for any project for which an EIA is required or for a project/ activity likely to have a cumulative significant negative environmental impacts unless the applicant produces an EIA licence issued by the Authority.

### **ISSUES TO BE CONSIDERED IN EIA?**

Ecological considerations, including:

a) Biological diversity

b) Sustainable use

c) Ecosystem maintenance

2. Social considerations

a) Economic impacts

b) Social cohesion or disruption

c) Effect on human health

d) Immigration or emigration

e) Communication – roads opened up, closed, rerouted

f) Effect on culture and objects of cultural value

3. Landscape

a) Views opened up or closed

b) Visual impacts

c) Compatibility with surrounding area

- d) Amenity opened up or closed e.g. recreation possibilities
- 4. Land uses, including:
  - a) Effect of proposal on current land uses and land use potentials in the project area
  - b) Effects of proposal on surrounding land uses and land use potentials
  - c) Possibility of multiple uses.
- 5. Water
  - a) Water sources (quantity and quality) – rivers, springs, lakes, underground water, and oceans.
  - b) Drainage patterns / drainage systems.

### **WHO ADMINISTERS EIA?**

The National Environment Management Authority (NEMA) is mandated by the Environmental Management and Coordination Act EMCA) no 8 of 1999 to administer the EIA.

### **WHO PAYS FOR THE EIA?**

The project proponent pays for the entire EIA process. The fee payable to NEMA is 0.05% of the project cost. **{EIA fees has been scrapped effective from January 2017}**

### **WHO QUALIFIES TO CARRY OUT AN EIA?**

Individual Experts or Firm of Experts registered by NEMA are the only ones to do all EIA/ EA studies. A register of the EIA experts is available in the Authority's headquarters, District and Provincial offices and can be accessed upon payment of a fee of Ksh. 200.

### **HOW DOES THE PUBLIC PARTICIPATE IN EIA?**

The law requires that during the EIA process a proponent shall in consultation with the Authority seek the views of persons who may be affected by the project or activity through posters, newspapers and radio; hold at least three public meetings with the affected parties and communities. The public participates by either submitting written or by making oral comments. Such comments are considered in reviewing the EIA Study Report.

### **EIA PROCESS:- WHAT STEPS ARE INVOLVED IN EIA?**

The key elements in the EIA process include: -

- 1) Development and submission of a Project Report for projects or activities which are not likely to have significant environmental impacts or those for which no EIA study is required. However, if the Authority considers that an EIA study is required, then the ensuing EIA process is as follows:
  - a) Scoping and drawing-up of Terms of Reference (TOR) for the study for approval by the Authority.
  - c) Gathering of baseline information through investigation/ research and subsequent submission of EIA Study Report to the Authority.
  - d) Review of EIA Study Report by the Authority and relevant lead agencies.

- 2) Decision on EIA Study Report includes approval, approval with conditions or rejection.
- 3) Appeals
- 4) Implementation of project.
- 5) Monitoring the project
- 6) Auditing the project

### **ISSUING OF ENVIRONMENTAL LICENSES AND PERMITS**

NEMA issues a wide range of environmental licenses and permits under various environmental regulations.

These include licenses on:

- Environmental Impacts Assessment (EIA).
- Effluent discharge
- Waste Management, transporters, incinerators and recyclers
- Import Export for controlled substances

Permits for:

- Access genetic resources
- trans boundary movement of waste
- Sand Harvesting sale and transportation

### **ENVIRONMENTAL IMPACT ASSESSMENT EXPERTS CRITERIA FOR THEIR REGISTRATION**

Local and Foreign environmental impact assessment individual and firm of experts wishing to undertake environmental impact assessment activities in Kenya shall register as Experts with the National Environment Management Authority on payment of the registration fees. The following shall be the criteria of experts' qualification

An **environmental inspector may enter any land/premises** to determine how far the activities the activities carried out on land/premises or land conform to the EIA report. Owner of the premises should keep records and submit them to the authority on an annual basis describing how far the operation of the project conforms with the EIA report. Where there are matters that were not contemplated in the report, the project proponent shall take measures to mitigate those matters as well.

On June 13<sup>th</sup>, 2003, the authority gazetted rules i.e. EIA and Audit Regulations. They state:

*'all projects commenced after 13<sup>th</sup> June, 2003 shall require an EIA licence and all projects which were ongoing as on 13<sup>th</sup> June, 2003 shall require an Environmental Audit. In June 2004 by a notice put up by the authority to require all industries to submit an audit by December 2004. Estimated that about 5000 operators submitted reports.*

Facilitator;

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