COUNTRY REPORT: KENYA
An Anatomy of Evolving Constitutionally Mandated Environmental Law Changes in Kenya during 2014

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Introduction

Since the adoption of a new Constitutional framework in Kenya, in August 2010, a significant number of legal developments have taken place. Primarily, this has been for two reasons. First, the implementation of a new constitution requires all existing laws be amended to avoid conflict with a supreme constitution. Second, in the Fifth Schedule, the constitution sets out a list of laws that should be enacted, including the requisite timeframes within which these laws must be promulgated. Laws regarding environmental management, minerals and land management fall within this category of laws that must be enacted within a defined period. A petition may be brought to the Chief Justice for dissolution of Parliament for failure to implement the constitution. In reality, relief is available to Parliament with an option to vote, with a two-thirds majority, to extend the timelines from time to time. Parliament has applied this relief several times, in some cases justifiably, especially where the subject laws raise significant public debate, and require more engagement with stakeholders. For this, and other reasons, many of the legal developments surrounding environmental and land management set out in this report are therefore in evolutionary stages, rather than in final form. The report also presents a 2014 judicial decision by the Environment and Land Court, which recognizes the existence of ethnic minorities and indigenous people's rights on the basis of identity.

Constitutional Basis of Developments and Changes in Environmental Law

The Constitution of Kenya is considered relatively new, enacted into law only in August 2010. It has introduced fairly significant changes in the overall architecture of environmental management, with clarifications in horizontal and vertical integration of mandates and

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functions. Primarily, the constitution crystallizes its role in horizontal integration, through the creation of a fundamental right to a clean and healthy environment. This Article 42 right, unlike socio-economic rights, is not one of progressive realization, meaning it is of immediate effect and application. For implementation of this right the Constitution, in Article 69, imposes a number of obligations that are required for fulfilment of the right on the Kenyan State, through legislative and other measures. Some of the options set out include putting in place measures to ensure sustainable management and utilization of natural resources, ensuring a national minimum tree cover of 10%, ensuring public participation in environment management, and ensuring implementation of environmental assessment and audit. Significantly, the Constitution creates a duty on the Kenyan state and its people to collectively work for attainment of ecologically sustainable development. The latter merges well with principles of governance set out in Article 10 of the Constitution, which are binding on the State and citizens when implementing the Constitution, law and public policy. One significant principle in Article 10 is sustainable development. Therefore, the supreme law of Kenya sets out environmental management and sustainable development side by side. This means that in implementing vertical integration of environmental law, those sectoral laws that implement the constitution have to observe this link between environment and sustainability.

Modifications to the Framework Environmental Law

Although the Constitution is the basis of horizontal integration of environmental law, Kenya has had since 1999 a framework environmental law in place. That law, the *Environmental Management and Coordination Act* (EMCA), clearly asserts its superiority, in section 148, over other sectoral laws, where environmental management is concerned. Due to changes in the national administration system and the need to align substantive environmental law to the constitution, changes have been proposed to EMCA, including the *Environmental Management and Coordination Act (Amendment) Bill* presently before the National Assembly of Parliament for debate.[1] The Bill sets out a variety of changes, and this report highlights two main ones.

[1] Kenya Gazette Supplements No. 114 (National Assembly Bills No. 31) 25 July 2014

Statutory Regularization of Strategic Environmental Assessment Provisions

Strategic environmental assessment (SEA) has been part of Kenyan environmental law for about a decade. However the principal law, EMCA, only sets out a mandatory requirement for environmental impact assessment (EIA), and SEA is only introduced through the subsidiary legislation enacted for implementation of the EIA requirements. Since SEA is a higher-level legal requirement than the project level EIA, it is arguable that implementation of SEA through subsidiary legislative is *ultra vires* the principal law, EMCA. Nonetheless, no legal challenges have been brought against SEA in court, and quite a number of SEA's have been undertaken on complex development plans. Since the 2010 Constitution now requires the State to implement measures on environmental assessment, to implement the right to a clean environment, the proposed amendments to EMCA include the insertion of a clause which anchors SEA in the principal law.

The scope set out in the Amendment Bill at section 57A is rather broad, stating in part "All policies, plans and programmes shall be subject to strategic environmental assessments." The scope of these policies, plans and programmes includes those prepared by an authority at national, county or local level, or which are prepared for adoption through legislative procedure by Parliament. It includes those plans, policies and programmes between the national and county governments, or their authorities.

A key challenge to these changes is the mechanism proposed as the trigger for the undertaking of an SEA. The Amendment Bill proposes that an SEA would be required where the National Environmental Management Authority (NEMA) makes a determination that the policy, plan or programme in question is likely to have significant effects on the environment. This approach is problematic, especially because it places what appears to be unfettered discretion on NEMA, while at the same time failing to set up criteria through which NEMA may arrive at this determination. In contrast, both EMCA and the Amendment Bill take a more certain approach on EIA implementation, setting out an entire schedule that sets out activities that must undergo an EIA. A similar approach, setting out minimum criteria through which NEMA decides when and how to trigger undertaking of an SEA could be helpful in enhancing the role of SEA as both a planning, and sustainability tool. However this is curable because the same provision of the Amendment Bill empowers NEMA to put in place regulations and guidelines to guide implementation of SEA, such as *National Guidelines for Implementation of Strategic Environmental Assessment* adopted for Kenya in 2014. These guidelines set out broad objectives of the SEA process for Kenya, and detail a procedure

that is to be followed in making a determination on whether an SEA is actually required. This, according to the guidelines, should commence with a screening process, a study with criteria for public participation, identification of alternatives, and validation of the report through a process that includes the public consulted during the study.

Mechanisms for Mandatory Parliamentary Approval of Natural Resource Exploitation Contracts

Article 71 of the Constitution addresses the exploitation of natural resources in Kenya. It provides that the government must seek Parliamentary approval for any agreement that involves the grant of a right or concession, for the exploitation of natural resources. At the outset, it is critical to point that this clause does not clearly set out the desired object of the parliamentary ratification of agreements, and does not set out any criteria that Parliament must apply prior to making a determination. Section 124A of the Amendment Bill attempts to further expound on the constitutional provision, but falls far short, because instead of setting out substantive requirements it merely provides for the enactment of further legislation detailing which transactions on exploitation of natural resources should undergo parliamentary vetting. The provisions of the Amendment Bill, however, set out some normative content, indicating that the future law shall specify the acreage, quantity, quality, value, location and dimensions of natural resources whose agreements will require parliamentary approval. Nonetheless, similar to the constitutional provisions, the one missing part is the desired objective or output of the parliamentary vetting of natural resource exploitation contracts. Since the Constitution requires in Article 69(1) the state to ensure sustainable exploitation of natural resources, that should be a primary consideration – on whether the agreement is binding the parties to sustainable exploitation. In addition, there are a host of challenges that arise in the context of resource exploitation, such as application of stabilization clauses that exempt companies from future changes in national laws – especially around environment, labour and occupational safety. Other issues that Parliament may need to address during vetting include rules pertaining to prevention of transfer pricing, as well as plans for environmental remediation and rehabilitation – for instance, as may be required by an EIA licence.

Introduction of a National Policy and Legal Framework for Climate Change

In 2010, Kenya made a major step in putting in place national strategies for addressing climate change challenges, upon adoption of the *National Climate Change Response*

Strategy. The strategy, among others findings, recommended the development of a *National Climate Change Action Plan*, that would use empirical and qualitative research to determine climate change intervention approaches, priorities, and set out an estimated cost of implementation, including quick wins, medium-term and long-term options. In early 2013, the government completed a complex process of research and public consultations with adoption of the *National Climate Change Action Plan, 2013-2017.* The action plan prominently proposed that Kenya should put in place (1) an overarching national legislation on climate change (2) an institutional framework to govern climate change, and (3) a national policy on climate change. In addition, out of the action plan process, the goal of climate change response in Kenya was identified as the attainment of "low carbon climate resilient development."

In late 2013, and through much of 2014, the government of Kenya commenced the process of enacting a national law and policy framework on climate change. A Climate Change Bill was presented to Parliament and approved in 2012, but was denied Presidential assent in early 2013 due to insufficient public consultations, and objections expressed by various stakeholders. The *National Task Force on Climate Change Law and Policy*, appointed by the Cabinet Secretary for Environment, Water and Natural Resources, spearheaded the 2013-2014 process of developing a new law and policy. It is useful to note that membership to the Task Force was drawn from across the public service sectors, private sector, and civil society. Indeed, a very strong collaboration has evolved between government, civil society and the private sector. This partnership is evidenced by the fact that the National Validation Workshop for the *Draft National Framework Policy on Climate Change* was co-sponsored by the Ministry of Environment, and the Kenya Association of Manufacturers, which is an industry group. Equally, various civil society organizations provided intellectual and financial support, with for instance Transparency International, and a local group, the Kenya Climate Change Working Group, offering to work with government to mobilize the public in rural areas.

The challenges facing the process were tremendous, especially because climate challenges have continued to evolve, but also because in March 2013, a new governance system, with 47 semi-autonomous county governments had come into place, after a general election.

Substantively, a major outcome of the process has been the framing of climate change as a matter of sustainable national development requiring holistic attention. This marks a departure from a common error where climate change has been dealt with as an

environmental problem. Therefore, significant emphasis has been placed in the draft policy on elaborating the linkage between climate change and sustainable development, and demonstrating how failure to firm up this link will result in national inability to address climate change. The object of climate change response in Kenya is therefore identified as attainment of low carbon climate resilient development. Although low carbon development is a critical cog and measures are set out to attain this, much of mitigation would be voluntary, where it affects strategic national interests, and where failure to do so could result in negative outcomes, such as maladaptation. The balance of the focus is on adaptation, through enhancing adaptive capacity, and building resilience.

Both the draft law and policy clearly focus on a functional institutional framework for the administration of mechanisms to combat climate change. There is concurrence that the bulk of implementation would be undertaken by county governments, since the specific sectoral inputs required for adaption, for instance, fall within functions and mandates granted to county governments by the Constitution. In this respect, a high level National Climate Change Council will be established to provide overall policy guidance on implementation of priorities. While a technical department is set up at national level, in the ministry responsible for climate change, the gist of the institutional arrangement is for county governments to bear the responsibility of implementation by mainstreaming climate change actions into sectoral laws, policies and actions. For this reason, Parliament has been asked to legislate a requirement that development planning at both national and county levels should integrate climate change interventions, from planning, to budgeting, to implementation and oversight mechanisms. For the latter, the national Parliament, and county Assemblies would bear responsibility for auditing compliance with climate change obligations by the national, and county governments, respectively. Similar provisions have been set out for the creation of climate change duties for the private sector, through subsidiary legislation – to ensure that there is revolving compliance by business and industry – and that duties evolve with national priorities and the state of knowledge at any given time.

New Dimensions in Judicial Interpretation of Land and Environmental Law - Recognition of Indigenous Peoples Status of the *Ogiek* Community of Kenya

The Decision in Joseph Letuya & 21 others v Attorney General & 5 others [2014] eKLR

The Environment and Land Court in Kenya delivered the judgment, on 17 March 2014. This is a special court created under Article 162(2) of the Constitution, and established through the 2012 *Environment and Land Court Act.* It is a superior court whose primary jurisdiction is

to determine suits arising from disputes in the land and environmental area of law, and therefore well suited to adjudicating the present dispute, which had first been filed in court in 1997.

The Facts:

The Applicants claimed that they are members of the Ogiek community who are also known as the Dorobo, who live in East Mau Forest (which is their ancestral land). Mau forest is one of the Kenya's main protected forests. They stated that about 10% of members of the Ogiek Community derive their livelihood from food gathering and hunting whilst the others practice peasant farming. They further claimed that their ancestors were living in the Mau Forest as food gatherers and hunters but upon the introduction of the colonial rule, their ancestral land was declared a protected forest. They claimed that since that declaration, members of this community have led a very precarious life, which has been deteriorating over the years. Further, they argued that when land for other African communities was set aside as Trust Land between 1919 and 1939, no land was set aside for them, with the consequence that no titles to land have been issued to its members as no adjudicating rights and registration of titles could take place. The Applicants contended that the government started allocating the land that the Ogiek community was occupying to other persons. For instance between 1993 and January 1997 others were mainly allocated land in the Eastern Mau Forest, which was originally occupied by the Ogiek Community. The Ogiek pointed out that continued harassment and eviction from their ancestral land prompted the filing of the suit.

The Issues:

The court framed several issues, two of them key: (1) Whether the members of the Ogiek Community have recognizable rights arising from their occupation of parts of East Mau Forest; (2) If so, whether in the circumstances of the instant case the rights of the Ogiek Community had been infringed by their eviction and allocations of land in East Mau Forest to other persons.

The Court addressed a number of rights raised by the Ogiek, in trying to answer the framed issues. In so doing, the Court noted that the Ogiek, when filing the suit, relied on their rights as a minority group in which they contended discrimination on account of their ethnicity and local connection to the forest. This is contrary to article 27(4) of the Constitution which prohibits the State from discriminating against any person on any ground, including race,

sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth. On this account, the Court found that the minority status of a community is determined by the numerical disadvantage of a community that has distinct ethnic, religious or linguistic characteristics. To reinforce this, the Court adopted the definition of indigenous people adopted in Article 1 of *ILO Convention No. 169 on The Rights of Indigenous and Tribal Peoples*, 1989, noting that the distinguishing factor for indigenous communities is their historical ties to a particular territory, and their cultural or historical distinctiveness from other populations that are often politically dominant. For this reason, the Court noted that the need for affirmative action for, and special consideration of minority and indigenous groups arises from the fact that indirect indiscrimination of these groups may result from certain actions or policies which on their face look neutral and fair, but which will have a differential effect on these groups because of their special characteristics.

The Court therefore concluded that, to the extent that the Applicants as an indigenous and minority group are prevented by the eviction and allocations from continuing to live in accordance with their culture as farmers, hunters and gatherers in the forest, they are specially and differently affected and discriminated against on account of their ethnic origin and culture. However, the Court also found that in strict legal terms, the land in question, as a protected forest, was government land subject to strict rules of tenure, and from which no tenure rights could derive on the basis of prescription, or adverse possession. Nonetheless, the Court referred to provisions of Article 63 of the Constitution that provides for community land, which is land held by communities identified on the basis of ethnicity, culture or similar community of interest. Community land, under the Constitution, includes (i) land lawfully held, managed or used by specific communities as community forests, grazing areas or shrines; (ii) ancestral lands and lands traditionally occupied by hunter-gatherer communities. With this clause in mind, the Court found that the provisions of the Constitution on community land are to be given effect to in and by an Act of Parliament on community land, which is yet to be enacted, and once enacted this is the law that will probably eventually settle the issue of the property rights of the Ogiek community in the Mau and other forests in which they claim ancestral rights. In addition, the Court found that the National Land Commission, established under Article 67 of the Constitution, is mandated to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress. For this reason, the Court determined that since such mechanisms exist, their claim was not ripe for judicial determination, and should be pursued through the necessary legislative processes on the community land legislation, and with the

National Land Commission. Paying more attention to the latter remedy, the Court directed the National Land Commission, within one year, to identify and open a register of members the Ogiek Community in consultation with the Ogiek Council of Elders, and identify land for the settlement of the said Ogiek members. Bearing in mind that the 2010 decision of the *African Commission on Human and Peoples Rights* that recognized the rights of the Endorois community, as an indigenous and minority community over the Lake Mbogoria National Reserve (wildlife protected area) has not been implemented, only time will tell whether the National Land Commission will implement this 2014 decision of the Court.