Land and environmental governance related to REDD+ implementation in Kenya

REDD+ Law Project - Briefing Paper

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The REDD+ Law Project is led by Baker & McKenzie and the Cambridge Centre for Climate Change Mitigation Research (University of Cambridge), working with international and local advisers/institutions to assist countries in the development and implementation of their national REDD+ legal frameworks.

More information regarding this initiative is available at http://www.4cmr.group.cam.ac.uk/research/projects/reddpluslawproject
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The Great Rift Valley, taken from the Nairobi-Lake Naivasha road, Kenya.
ABOUT THIS BRIEF

The UNFCCC framework asks countries to include a national REDD+ institutional framework with certain key elements, many of which will draw on existing legal frameworks. For example, as part of their national strategies and action plans (discussed above), countries are requested to address several issues including:

- Land tenure issues:¹ The importance of land tenure for regulating land use and assigning benefits from REDD+ has been widely noted. Nonetheless, clarifying and then administering land tenure is a complicated issue that presents a challenge for many countries. Tenure systems can contain many different kinds of rights², and land rights can be a source of conflict and political debate. REDD+ presents a new opportunity to consider this challenge, in addition to creating what could be new resource rights (eg. to carbon);

- Forest governance issues:³ It is likely that REDD+ policy will build on existing forest governance structures and strategies, which could include efforts to police illegal logging, anti-corruption work, the administration of concessions (if they exist), the establishment of national parks, and so on. REDD+ is seen by some countries as a mechanism to bolster existing national programmes with a new source of revenue;

The purpose of this section is to identify the laws, policies institutions relevant to the implementation of a national REDD+ programme in Kenya, with respect to land and environmental governance.

¹ Cancun Decisions (Decision 1/CP.16/2010 - “The Cancun Agreements”), paragraph 72.
² Different kinds of rights can be found within a land tenure system, such as:
   - Right to ownership: the owner is entitled to use, control and dispose of the property.
   - Right to use:
     - Right to access: for example, an easement confers the right to use the real property of another for a specific purpose (for example, access to another property).
     - Usufructuary right: Refers to the right of one individual to use and enjoy the property of another, provided its substance is neither impaired nor altered (for example, rights to use water from a stream for household use).
     - Right to exploit: For example, a profit a prendre is the right of persons to share in the land owned by another, enabling a person to take part of the soil or produce of land that someone else owns (for example, a logging concession).
   - Right to control, ie. entitled to make decisions about how land should be used.
   - Right to transfer, ie. entitled to sell, inherit and/or reallocate property rights.
³ Cancun Decisions (Decision 1/CP.16/2010 - “The Cancun Agreements”), paragraph 72.
1 BACKGROUND TO KENYA’S LEGAL SYSTEM

The purpose of this section is to provide background context to Kenya's legal system. Any country's legal system is made up of policies, laws, institutions, conventions and historical memory. Together these elements create a unique context in which to consider any given law or regulatory issue.

1.1 Difference between government policy and law

Within Kenya’s legal system, different kinds of documents have different legal statuses. Statutes can be distinguished from policy. Kenya’s National Climate Change Response Strategy notes that “one of the key functions of policy is to advise and direct the government and the governed on necessary actions to address identified problems,” however, “given that policy is not binding, there would be no legal consequence on a government or a people for failing to implement their policy.”

An important source of government policy is government sessional papers. Sessional papers can be reports, or other documents that reflect on either the government’s strategy, administrative guidelines or policy. While sessional papers are not law, they reflect what the government intends to create and implement as law.

The laws that create legal frameworks are binding, and although their implementation might be guided by Government policy (including sessional papers), the creation and amendment of laws involves approval by the legislature (rather than just the Government in power, or individual members of that Government). Laws are enforceable, and violation of the law could result in a penalty or other legal remedy (such as compensation for a person who has been harmed by an unlawful act).

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1.2 Constitutional law

1.2.1 Constitutional history of Kenya: From 1964 to 2010

Kenya, formally a British Colony, was granted full independence on 12 December 1963 and thus became a Republic. Prior to independence, Kenyan political leaders went to London to negotiate the Independence Constitution with the British colonial office. The negotiations occurred in 1960 and 1962 during the Lancaster House constitutional conferences held in London and continued in Nairobi in 1963.

The Independence Constitution became effective in 1963 following Kenya’s attainment of full independence. Features of the Independence Constitution include:

- A multi-party system of government;
- A Westminster-style parliamentary government, with a Prime Minister as the Head of Government and the Queen as the Head of State;
- A majimbo (or decentralized) system of governance;

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The executive authority of the Government of Kenya was vested in Her Majesty (Queen of England), and exercised on her behalf by the Governor-General either directly or by officers subordinate to him. The Prime Minster was appointed by the Governor-General from among members of the House of Representatives, chosen for his potential to command the support of a majority of the members of the House.

Kiswahili word for decentralization. It means distribution of power between the central government and the seven regions listed in Article 91 of the Independence Constitution of Kenya. This provided for equal sharing of
- A bicameral legislature⁷;
- A Supreme Court⁸, Kadhi⁹ Court and various Commissions¹⁰.

In 1964, Kenya became a Republic.¹¹ A constitutional amendment replaced the Prime Minister with the Office of the President,¹² making the President the Head of State and the Head of Government. Numerous other amendments to the Independence Constitution had an impact on the operation of democracy and respect for the rule of law¹³; amendment procedures allowed change for political purposes.¹⁴

In response to the weaknesses in constitutional procedures, demands for reform to the Constitution

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³ The Parliament consisted of Her Majesty and the National Assembly. The National Assembly comprised of two houses, i.e. a House of Representatives and a Senate. The Senate represented the 40 districts and Nairobi area while the House of Representatives represented the constituencies. See Part IV of the Independence Constitution of Kenya available at http://www.mlgi.org.za.

⁷ The Supreme Court had unlimited original jurisdiction to hear and determine any civil or criminal proceedings under any law.

⁸ The Kadhi’s Court is one of the subordinate courts in Kenya as stipulated in Article 169(1) of the Constitution. The jurisdiction of the Kadhi’s court is limited to the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance. All the parties to any proceedings should profess the Muslim religion and submit to the jurisdiction of the Kadhi’s courts (see Article 170(5) of the Constitution).

¹⁰ Such as the Judicial Service Commission and a Public Service Commission.


¹² By virtue of Section 8 of the amendment Act, the first Prime Minister became the first President of Kenya.

¹³ In Njoya & 6 others v Attorney General and 3 others (2008) 2 KLR (EP), the High Court noted that: "Since independence in 1963, there have been thirty-eight (38) amendments to the Constitution. The most significant ones involved a change from Dominion to Republic status, abolition of regionalism, change from parliamentary to a presidential system of executive governance, abolition of a bi-cameral legislature, alteration of the entrenched majorities required for constitutional amendments, abolition of the security of tenure for judges and other constitutional office holders (now restored), and the making of the country into a one party state (now reversed). And in 1969 by Act No. 5 Parliament consolidated all the previous amendments, introduced new ones and reproduced the Constitution in a revised form. The effect of all those amendments was to substantially alter the Constitution. Some of them could not be described as anything other than an alteration of the basic structure or features of the Constitution. And they all passed without challenge in the courts.” Available online at www.kenyalawreports.or.ke.

¹⁴ Thresholds for approving constitutional amendments were reduced. The constitutional amendment procedure (regarding a 14 day requirement for publication of an amendment bill) was violated in 1974 in order to adopt a presidential directive requiring parliamentary proceedings to be in Kiswahili. All stages were debated in one sitting to effect this constitutional change.
were made by both the judiciary and civil society during the 1990s.\textsuperscript{15} Reform work eventually led to the Constitution of Kenya Review Act (2008) and the Constitution of Kenya (Amendment) Act (2008). Following a consultative process, the Harmonised Draft Constitution was subjected to a national referendum in 4\textsuperscript{th} August 2010. It was accepted by a majority of Kenyans and promulgated into law on 27 August 2010.

### 1.2.2 Overview of the Constitution of Kenya 2010

The Constitution of 2010 establishes a governing framework for Kenya. It includes provisions with respect to the following:

- Citizenship (Chapter 3);
- A bill of rights (Chapter 4);
- Land and environment (Chapter 5);
- Leadership and integrity (Chapter 6);
- The structure of the legislature, executive and judiciary (Chapters 8, 9 and 10 respectively); and
- Public finance (Chapter 12).

The transitional provisions of the new Constitution require that all existing law should be interpreted with “the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with [the new Constitution].”\textsuperscript{16}

The Constitution contains a power to make new laws regarding:

- Community land (Article 63);
- Regulation of land use and property (Article 66);
- Legislation on land (Article 68), agreements relating to natural resources (Article 71); and
- Legislation regarding environment (Article 72).

Article 69 of the Constitution deals with obligations in respect of the environment, and provides for the State to:


\textsuperscript{16} Constitution 2010, Sixth Schedule: Transitional and Consequential provisions, Part 2: Existing Obligations, Laws and Rights, 7(1) – All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.
• Ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits\textsuperscript{17};
• Work to achieve and maintain a tree cover of at least ten percent of the land area of Kenya\textsuperscript{18};
• Encourage public participation in the management, protection and conservation of the environment\textsuperscript{19};
• Protect genetic resources and biological diversity\textsuperscript{20};
• Establish systems of environmental impact assessment, environmental audit and monitoring of the environment\textsuperscript{21};
• Eliminate processes and activities that are likely to endanger the environment\textsuperscript{22}; and
• Utilise the environment and natural resources for the benefit of the people of Kenya\textsuperscript{23}.

1.2.3 Devolution of authority

1.2.3.1 Introduction

When Kenya attained independence in 1963, the Independence Constitution (that was negotiated between 1960 and 1962 during the Lancaster House constitutional conferences held in London, and continued in Nairobi in 1963) became effective. Although the Independence Constitution provided for a devolved system of governance,\textsuperscript{24} several constitutional amendments created a centralised system of governance.\textsuperscript{25} It was widely perceived that centralised government bureaucracies prevented the effective delivery of public services,\textsuperscript{26} prompting calls for the devolution of power that was eventually included in the Constitution of 2010. The constitutional devolution of power is enacted by several pieces of legislation, including:

\textsuperscript{17} Constitution of Kenya 2010, Article 69(1)(a).
\textsuperscript{18} Ibid, Article 69(1)(b).
\textsuperscript{19} Ibid, Article 69(1)(d).
\textsuperscript{20} Ibid, Article 69(1)(e).
\textsuperscript{21} Ibid, Article 69(1)(f).
\textsuperscript{22} Ibid, Article 69(1)(g).
\textsuperscript{23} Ibid, Article 69(1)(h).
\textsuperscript{24} The regions were given significant responsibilities such as collection of taxes, maintenance of schools, health facilities and minor roads.
\textsuperscript{25} These constitutional amendments were effected through the Constitution of Kenya (Amendment) Act No. 38 of 1964, Constitution of Kenya (Amendment) Act No. 16 of 1968 and Constitutional Amendment Act No. 40 of 1966.
a) Urban Areas and Cities Act (No. 13 of 2011);
b) Commission of Revenue Allocation Act (No. 16 of 2011);
c) Intergovernmental Relations Act (No. 2 of 2012);
d) Public Finance Management Act (No. 18 of 2012);
e) National Government Coordination Act (No. 1 of 2013);
f) Transition County Allocation of Revenue Act (No. 6 of 2013);
g) Transition County Appropriation Act (No. 7 of 2013);
h) County Governments Public Finance Management Transition Act (No. 8 of 2013);
i) The County Governments Act (No. 17 of 2012);
j) Constituencies Development Fund Act (No. 30 of 2013); and
k) Division of Revenue Act (No. 31 of 2013).

1.2.3.2 Constitutional provisions on devolution

1.2.3.2a Objectives of devolution

The objectives of devolution are elucidated in Article 174 of the Constitution. They are:

(a) To promote democratic and accountable exercise of power;
(b) To foster national unity by recognising diversity;
(c) To give powers of self-governance to the people and enhance the participation of the people in the exercise of the powers of the State and in making decisions affecting them;
(d) To recognise the right of communities to manage their own affairs and to further their development;
(e) To protect and promote the interests and rights of minorities and marginalised communities;
(f) To promote social and economic development and the provision of proximate, easily accessible services throughout Kenya;
(g) To ensure equitable sharing of national and local resources throughout Kenya;
(h) To facilitate the decentralisation of State organs, their functions and services, from the capital of Kenya; and
(i) To enhance checks and balances and the separation of powers.

1.2.3.2b Levels of Government in Kenya

The State is divided into two levels of government, being
i) the National Government, and
ii) the County Governments (consisting of 47 counties).

The two levels of government are both distinct and interdependent, required to conduct their mutual
affairs on the basis of consultation and cooperation.\textsuperscript{27}

The Fourth Schedule of the \textit{Constitution} clearly states that the National Government is responsible for the protection of the environment and natural resources. However, the County Governments are responsible for the implementation of specific national government policies on natural resources and environmental conservation such as forestry, soil and water conservation.\textsuperscript{28}

\subsubsection{1.2.3.2c Cooperation between National and County Governments\textsuperscript{29}}

The two levels of government are supposed to perform their functions and exercise their powers in a manner that respects the functional and institutional integrity, as well as constitutional status and institutions, of the other level. In addition, they are supposed to assist and support each other.

In the event that a dispute between the two levels of governments occurs, they are expected to make every reasonable effort to settle the dispute by negotiation, mediation and arbitration.\textsuperscript{30}

The \textit{Intergovernmental Relations Act (No.2 of 2012)} was enacted to establish a framework for consultation and co-operation between the National and County Governments and amongst County governments. It also establishes mechanisms for the resolution of intergovernmental disputes.

\subsubsection{1.2.3.2d The Role of the National Assembly and the Senate}

Parliament is divided into the National Assembly and the Senate. The National Assembly represents the people of the constituencies\textsuperscript{31} while the Senate represents the Counties.\textsuperscript{32} In this regard, the National Assembly is responsible for determining the allocation of national revenue between the two levels of government as well as overseeing their expenditure, while the Senate is responsible for allocation of national revenue among Counties and overseeing the national revenue allocated to the County governments.\textsuperscript{33}

\textsuperscript{27} Article 6 of the Constitution.
\textsuperscript{28} See Section 5 of the County Government Act (No. 17 of 2012) and Fourth Schedule of the Constitution.
\textsuperscript{29} Article 189 of the Constitution.
\textsuperscript{30} Article 189 (2) and (3) of the Constitution.
\textsuperscript{31} According to Article 89 of the Constitution, Kenya has 290 constituencies.
\textsuperscript{32} Articles 95 and 96 of the Constitution.
\textsuperscript{33} Article 96 (3) of the Constitution of Kenya.
1.2.3.2e National Executive

The National Executive comprises of the President, the Deputy President and the rest of the Cabinet.\textsuperscript{34}

1.2.3.2f County Government

The County Government comprises of the County Executive and the County Assembly.

1.2.3.2g County Assembly

The County Assembly representatives are elected by registered voters of a ward on the same day as the general elections of Members of Parliament.\textsuperscript{35} The County Assembly has a Speaker who is elected by the County Assembly from among persons who are not members of the said Assembly.\textsuperscript{36}

1.2.3.2h County Executive Committee

The County Executive Committee consists of the Governor, Deputy Governor and members\textsuperscript{37} appointed by the County Governor, with the approval of the County Assembly, from among persons who are not members of the County Assembly.\textsuperscript{38}

1.2.3.2i Functions of the County Executive Committee

The functions of the County Executive Committee are spelt out in Article 183 (1), (2), and (3) of the Constitution. They include:

a) Implementing county legislation;
b) Implementing, within the county, national legislation to the extent that the legislation so requires;

\textsuperscript{34} Article 130 of the Constitution. According to Article 152 of the Constitution, the Cabinet consists of the President, the Deputy President, the Attorney General and the Cabinet Secretaries. The Cabinet Secretaries should not be less that fourteen and more than twenty two. The Cabinet Secretaries are nominated by the President and the names are presented to Parliament for approval. Once approved by Parliament, the persons are appointed as Cabinet Secretaries by the President. A Member of Parliament cannot be a Cabinet Secretary.

\textsuperscript{35} Article 177 of the Constitution.

\textsuperscript{36} Article 178 of the Constitution.

\textsuperscript{37} According to Article 179(3), the members should not exceed one-third of the number of members in the county assembly if the assembly has less than thirty members. In the event that the assembly has more than thirty members, then the members should not exceed ten.

\textsuperscript{38} Article 179 (1) and (2) of the Constitution.
c) Managing and coordinating the functions of the county administration and its departments;
d) Preparing proposed legislation for consideration by the county assembly;
e) Providing the county assembly with full and regular reports on matters relating to the county; and
f) Performing any other functions conferred on it by this Constitution or national legislation.

1.2.3.2j Functions of County Assemblies

The functions of the County Assemblies are stipulated in Article 185 of the Constitution and Section 8(1) of the County Government Act (No. 17 of 2012). They include:
a) Making laws that are necessary for, or incidental to, the effective performance of the functions and powers of the county government;
b) Exercising oversight over the County Executive committee and any other County Executive organs but while doing so must respect the principle of separation of powers;
c) Receiving and approving plans and policies for the management and exploitation of the resources of the county as well as the development and management of the infrastructure and institutions of the County;
d) Vet and approve nominees for appointment to county public offices;
e) Approve the budget and expenditure of the county government;
f) Approve the borrowing by the county government; and

g) Approve county development planning.

1.2.3.2k Functions of the National Government

The distribution of functions between the County Government and the National Government are contained in the Fourth Schedule of the Constitution. In this regard, the functions of the National Government include, inter alia:
a) Foreign affairs, foreign policy and international trade;
b) General principles of land planning and the co-ordination of planning by the counties;
c) Protection of the environment and natural resources;
d) Immigration and citizenship;
e) National defense;
f) Police services;
g) Courts; and

39 If there is a function that is not assigned by the Constitution or national legislation to a county, then it is a function or power of the National Assembly. See Article 186(3) of the Constitution.
h) Transport and communications.

1.2.3.2 \textit{Functions of County Government}^{40}

The functions of the County Government include, \textit{inter alia}:

a) Agriculture;
b) Implementation of specific national government policies on natural resources and environmental conservation such as forestry, soil and water conservation;
c) County transport;
d) County health services;
e) Trade development and regulation;
f) Development and reform of county legislation; and
g) Establishment and staffing on county public service.

1.2.3.2m \textit{Transfer of functions or powers between the two levels of government}^{41}

A function or power of one level of government may be transferred to the other level of government by agreement between the two levels of government if:

a) The function or power would be more effectively performed or exercised by the receiving government;
b) The said transfer is not prohibited by any legislation

In such an event, arrangements will have to be made to ensure that the resources required to facilitate performance of the function or power are transferred to the receiving county.\textsuperscript{42} However, the constitutional responsibility for the performance of the function or exercise of the power remains with the government to which the function or power was assigned by the fourth schedule of the Constitution.\textsuperscript{43}

1.2.3.2n \textit{Conflict of laws}

In certain matters, the National government and the County government have concurrent jurisdiction,

\textsuperscript{40} See Section 5 of the County Government Act (No. 17 of 2012), and Fourth Schedule of the Constitution.
\textsuperscript{41} See Article 187 of the Constitution.
\textsuperscript{42} See Article 187(2a).
\textsuperscript{43} See Article 187(2b).
hence, the County legislation could contradict National legislation. If this happens, national legislation will prevail over County legislation if the national legislation in question applies uniformly throughout Kenya and the national legislation is aimed at preventing unreasonable action by a county that would be prejudicial to the economic, health or security interests of Kenya or another county, or would impede the implementation of national economic policy.\(^\text{44}\)

However, it should be noted that a decision by a court that a provision of legislation of one level of government prevails over a provision of legislation of another level of government does not invalidate the other provision. The other provision is only deemed inoperative to the extent of the inconsistency.\(^\text{45}\)

### 1.2.3.2o Powers of County Government

The purpose of the County Government Act (No. 17 of 2012) is to provide for county governments’ powers, functions and responsibilities to deliver services and for connected purposes. In this regard, Section 6 of the said Act provides for the legal status and powers of a county government. A county government is a body corporate with perpetual succession.\(^\text{46}\) Hence, a County Government can:

a) Enter into a contract;

b) Acquire, purchase or lease any land; or

c) Delegate any of its functions to its officers, decentralised units or other entities within the county.

To enable the county government to perform its functions, the County Government Act (No. 17 of 2012) at Section 6 (3) permits the county government to enter into partnerships with any public or private organization. In addition, Section 6(5) allows the county government to establish a company, firm or body, or contract a person, company, firm or body to deliver a particular service or carry out a particular function of the county government.

### 1.2.3.2p Transition to a devolved system of government

Schedule Six Part 4 of the Constitution provides for the transition from a centralized to a decentralized system of government. In this regard, it provides for the enactment of legislation to

\(^{44}\) See Article 191 of the Constitution.

\(^{45}\) Article 191(6) of the Constitution.

\(^{46}\) Section 6(1) of the County Government Act (No. 17 of 2012).
effect the said transition. One of these statutes is the Transition to Devolved Government Act (No. 1 of 2012), the objectives of which are to:  

[(a) provide a legal and institutional framework for a coordinated transition to the devolved system of government while ensuring continued delivery of services to citizens; 
(b) provide, pursuant to section 15 of the Sixth Schedule to the Constitution, for the transfer of powers and functions to the national and county governments; 
(c) provide mechanisms to ensure that the Commission for the Implementation of the Constitution performs its role in monitoring and overseeing the effective implementation of the devolved system of government effectively; 
(d) provide for policy and operational mechanisms during the transition period for audit, verification and transfer to the national and county governments of— 
   (i) assets and liabilities; 
   (ii) human resources; 
   (iii) pensions and other staff benefits of employees of the government and local authorities; and 
   (iv) any other connected matters; 
(e) provide for closure and transfer of public records; and 
(f) provide for the mechanism for capacity building requirements of the national government and the county governments and make proposals for the gaps to be addressed.]

Section 4 of the Transition to Devolved Government Act (No. 1 of 2012) establishes the Transition Authority whose mandate is to facilitate and co-ordinate the transition to the devolved system of government. The Authority is required to come up with a transition implementation plan to facilitate the transition process. The activities of the said authority are to be undertaken in two phases. Phase one is the period between the time that the Transition to Devolved Government Act (No. 1 of 2012) came into effect and the general elections of 4th March 2013. Phase one is basically for carrying out audits of assets, liabilities, infrastructure and staff of national and county governments; civic education; facilitating the initial preparation of county budgets and county profiles; providing mechanisms for closure and transfer of public records and information; facilitating the development of county public finance management system; providing a mechanism for the transition of government and local authority employees; providing for a mechanism for the transfer of government net assets

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47 Section 3 of the Transition to Devolved Government Act (No.1 of 2012).
48 See also Section 7 of the Transition to Devolved Government Act (No.1 of 2012).
49 See Article 16 of the Transition to Devolved Government Act (No.1 of 2012).
50 Section 2 of the Transition to Devolved Government Act (No. 1 of 2012).
and liabilities to national and county governments; and, providing mechanisms for the transfer of assets and liabilities. Phase two is the period of three years after the first general election under the new Constitution (that is, 4th March 2013). Phase two entails overseeing the transfer of functions from the national government to the county government, and facilitating the county governments in the performance of their functions.\textsuperscript{51}

The Commission for the Implementation of the Constitution is mandated to monitor and oversee the transition process to devolved government.\textsuperscript{52}

The Commission for Revenue Allocation is established under Article 215 of the Constitution. Its functions are to, inter alia, make recommendations concerning the basis for the equitable sharing of revenue raised by the national government between the national and county governments and among the county governments. It is also mandated to make recommendations about the financing of and financial management by county governments.\textsuperscript{53} Its recommendations are to be submitted to the Senate, the National Assembly, the National Executive, County Assemblies and County Executives for consideration and adoption.

The Commission on Revenue Allocation Act (No. 16 of 2011) was enacted to make further provision on the functions and powers of the Commission on Revenue Allocation.

The Division of Revenue Act (No. 31 of 2013) is a very short statute containing about six pages. It provides for the equitable division of revenue raised nationally between the national and county governments in 2013/14 financial year.

1.2.3.2q Transition period

According to Section 2 of the Transition to Devolved Government Act (No. 1 of 2012), transition from centralized to decentralized system of government is supposed to commence on the date that the Transition to Devolved Government Act (No. 1 of 2012) came into effect to three years after the first general election (hence three years after 4\textsuperscript{th} March 2013). The transition process is divided into two phases (as discussed above).

\textsuperscript{51} Fourth Schedule of the Transition to Devolved Government Act (No. 1 of 2012).

\textsuperscript{52} See section 15 (d) of the Sixth Schedule to the Constitution and Section 15 of the Transition to Devolved Government Act (No. 1 of 2012).

\textsuperscript{53} See Article 216 of the Constitution.
1.2.3.2 Effect of Devolution on the Kenyan Legal System

The introduction of a decentralized system of government necessitated the repeal and enactment of various legislation. For example, the Local Government Act (Cap 265 of the Laws of Kenya) was repealed. Various statutes were enacted and continue to be enacted. The Fifth Schedule of the Constitution provides for timeliness for the enactment of relevant legislation to give effect to the provisions of the Constitution.

1.2.3.2s Challenges of decentralisation and devolution

There is a clear disparity in the level of development between different Counties in Kenya. For example, Uasin Gishu and Nakuru County cannot be said to be at the same level of development in terms of infrastructure and service delivery. This creates a challenge for devolution. The Constitution of Kenya at Article 204 tries to bridge the development gap through the equalization fund to be financed by one-half per cent (0.005 percent) of nationally collected revenues. The purpose of this fund is ‘to provide basic services including water, roads, health facilities and electricity to marginalised areas to the extent necessary to bring the quality of those services in those areas to the level generally enjoyed by the rest of the nation.’ The fund will be maintained for a period of twenty years, a term which the National Assembly may extend.

According to the Institute of Social Accountability, a lot of tasks that were to be performed under Phase One of the Transition Authority Plan discussed above are yet to be undertaken. In addition, there is poor public participation in the process of devolution and decentralisation. Moreover, the Authority has not been submitting functional reports as required by the Transition to Devolved Government Act (No. 1 of 2012), therefore, it is difficult for the progress in devolution to be clearly tracked. All these are seen as challenges of the devolution and decentralization process. To ensure that the devolution and decentralization process is successful, the Constitution of 2010 should be fully implemented.
1.3 The Law-making process in Kenya

1.3.1 Sources of Kenyan law

Article 2(5) and (6) of the Constitution of Kenya and Section 3 of the Judicature Act outline 6 sources of law in Kenya:

1. The Constitution of 2010, as the supreme law of Kenya\(^{54}\);
2. Legislation by Parliament\(^{55}\);
3. General rules of international law\(^{56}\);
4. Any treaty or convention ratified by Kenya\(^{57}\);
5. Common Law, doctrines of equity and statutes of general application in force in England on the 12th August, 1897 shall apply so far only as the circumstances of Kenya and its inhabitants permit and subject to such qualifications as those circumstances may render necessary\(^{58}\); and
6. African Customary Law, provided that it is not repugnant to justice and morality or inconsistent with any written law\(^{59}\).

There is a hierarchy of different kinds of statutes (all of which are superior to African customary law):

- Acts of the Kenyan Parliament;
- Specific Acts of the Parliament of the United Kingdom (as cited in Part I of the schedule to the Judicature Act);
- Subsidiary or Delegated or Subordinate legislation; and
- Statutes are English statutes of General application, in force in England on the 12\(^{th}\) August 1897\(^{60}\).

In addition to the above sources of law, there are policies established by various government Ministries which set out their goals and planned activities to achieving the stated goals. They are usually contained in policy papers, sessional papers and development plans. An example of such a

\(^{54}\) Constitution, Article 2.
\(^{55}\) Judicature Act, Section 3(1)(b).
\(^{56}\) Constitution, Article 2(5).
\(^{57}\) Constitution, Article 2(6).
\(^{58}\) Judicature Act, Section 3(1)(c).
\(^{59}\) Judicature Act, Section 3(2); and, Constitution, Article 2(4).
\(^{60}\) This date is significant because it is the date when Kenya became a British Colony, and therefore the laws of Great Britain began applying.
policy is the Kenya National Land Policy that informed the consolidation and revision of the Land Laws of Kenya.

1.3.2 Primary legislation

Article 93 of the Constitution of 2010 establishes the Parliament of Kenya, giving it law-making power in Articles 95-96. The Parliament consists of both:

- the National Assembly, which makes laws that affect national issues; and
- the Senate, which makes laws concerning counties.

Chapter 8, Part 4 of the Constitution of 2010 lays down the procedure for enacting legislation in Kenya. Parliament exercises its legislative power through Bills passed by Parliament, which can be either a Public Bill or a Private Bill:

- **A Public Bill**, except a Money Bill, is a Bill introduced by any member or committee of either the National Assembly or Senate. It deals with matters of public policy under the national or county level. Any Public Bill may originate from the National Assembly. However, a Public Bill not concerning county governments can only be considered in the National Assembly.

- **A Private Bill** is a Bill which is intended to affect or benefit some particular person, association or corporate body. Its manner of introduction to Parliament and other points of procedure are different from those relating to a Public Bill.

Once the President assents the Bill, it becomes law.

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61 At Articles 95(3) and 96(2) of the Constitution of Kenya, 2010.

62 A bill is draft legislation. After passing through the National Assembly and receiving the President’s assent, it becomes an Act of Parliament or statute.


64 A money bill is a bill that contains provisions dealing with taxes and public funds. However, a bill regarding division and allocation of revenue is not considered a money bill and can only be introduced in the National Assembly. See Articles 114 and 218 of the Constitution of Kenya 2010.

65 See Article 109(5) of the Constitution of Kenya 2010 and Article 124(1) of the National Assembly Standing Orders and Article 115(1) of the Senate Standing Orders.

66 A bill concerning county government is a bill that contains provisions related to the functions and powers of the county governments, the finances of county governments, or the election of members of county assembly or county executive. It can be either a special bill or an ordinary bill. A special bill concerns the election of members of a county assembly or county executive, or the annual county allocation of revenues bill. This is stipulated in Article 110 of the Constitution of Kenya, 2010.
1.3.3 **Subordinate Legislation (including Regulations)**

In some cases, it is necessary for a non-parliamentary body (such as a Ministry working under a delegated power) to formulate subordinate legislation that gives more details on matters contained in the law.

Regulations are part of subsidiary legislation made pursuant to Acts of Parliament (also called *primary legislation*). The [Interpretation and General Provisions Act](#) (Chapter 2) defines "subsidiary legislation" to mean any legislative provision (including a transfer or delegation of powers or duties) made in exercise of a power in that behalf conferred by a written law, by way of by-law, notice, order, proclamation, regulation, rule, ruling of the court or other instrument.

Generally, laws are made by the legislature whereas subsidiary legislation is made by a person or bodies other than the legislature but with the legislature's authority under a power conferred on them by Acts of Parliament in order to implement and administer the requirements of that primary legislation. Laws made in subsidiary legislation are usually called *rules, regulations, orders* and *notifications*. Often, a legislature passes statutes that set out broad outlines and principles and delegates authority to an executive branch official to issue delegated legislation that provides both the details (*substantive regulations*) and procedures for implementing the substantive provisions of the statute and substantive regulations (*procedural regulations*). Subsidiary legislation can also be amended faster than primary legislation.

Section 32 of the [Interpretation and General Provisions Act](#) (Chapter 2) provides that a reference to a written law in another written law shall include a reference to subsidiary legislation made under the written law to which reference is made. In addition, it is worth noting that the [Interpretation and General Provisions Act](#) (Chapter 2) at 24 states that "where an Act or part of an Act is repealed, subsidiary legislation issued under or made in virtue thereof shall, unless a contrary intention appears, remain in force, so far as it is not inconsistent with the repealing Act, until it has been revoked or repealed by subsidiary legislation issued or made under the provisions of the repealing Act, and shall be deemed for all purposes to have been made there under." In this way, subsidiary regulations made under repealed Acts can remain valid until superceded.
1.4 **Relationship between customary law and statute law**

Customary law is one of the legally acknowledged sources of law in Kenya. The sources of law are listed in section 3[1] of the **Judicature Act** according to their superiority. This is in acknowledgement of the fact that there may be, and indeed there are, conflicts within the laws and it are imperative to determine which law will supersede in such cases.

Section 3 of the **Judicature Act** ranks the application of the laws in Kenya (noting that the **Judicature Act** could be revised to align with the 2010 **Constitution**):

1. The Constitution,
2. Statutes;
3. English Common Law and Equity; and

Statute law is superior to customary law and in the event of conflict between the two, statute law prevails. Under the **Judicature Act**, customary law will guide the courts only in civil matters, and will apply only as long as it is not inconsistent with any written law applicable in Kenya and it is not repugnant to justice and morality. Moreover, customary law will only guide the courts in civil cases where one or more of the parties is subject to it or is affected by it.

Article 2 of the **Constitution of 2010** provides that any law, including customary law, which is inconsistent with the **Constitution**, is void to the extent of the inconsistency. The transitional clauses under the **Constitution** also provide that all laws in force on the day of its coming into force must be construed with the alterations, qualifications and exceptions necessary to bring them into conformity with the **Constitution**. This means that all laws must be read in the light of the equality and non-discrimination provisions of the **Constitution** and Kenya's international human rights obligations.

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67 A variety of approaches can be used for integrating customary land law into national legal systems: judicial recognition, resulting in the selective absorption of customary legal rules into the nation’s common law (a process which can be supported by deducing the content of customary law and providing members of the judiciary with access to this information); codification of customary law; registration of customary land rights as customary rights (rather than converting them to statutory tenure); modification by legislation of negative aspects of customary land law (such as gender biases); creating hybrid institutions that administer customary land rights, involving both officials and traditional authorities; and, modernising traditional land administration institutions through mechanisms such as registration of land allocations/dealings, with increased public participation in and transparency of decision-making. *Source: USAID, Kenya Land Policy: Analysis and Recommendations* (April 2008, Updated My 2009).

68 For instance, the Customary Laws of some communities in Kenya tolerate forced marriage, child marriage and the exclusion of women from inheritance, practices that offend the Constitution, Statute and other laws.

69 See *Martha Gukiya Thui & Another V Kibugi Hingi & Another* [2010] eKLR.

70 Section 3(1) of the Judicature Act and *Omwoyo Mairura Vs. Bosire* [1958].

71 Section 3(2) Judicature Act.
1.5 Organisation of government

The Government has three arms: the Executive, the Legislature and the Judiciary.

1.5.1 Executive

The Executive is divided into the National Executive and the County Executive:
- The National Executive arm of government is led by the President and the Deputy President; and
- The County Executive is led by the Governor and the Deputy Governor.

There are 18 Ministries in the National Executive that are headed by Cabinet Secretaries:

LIST OF GOVERNMENT MINISTRIES IN KENYA

<table>
<thead>
<tr>
<th>NO.</th>
<th>MINISTRY</th>
<th>CABINET SECRETARY</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>Agriculture, Livestock and Fisheries</td>
<td>Mr. Felix Kosgey</td>
</tr>
<tr>
<td>2.</td>
<td>National Treasury</td>
<td>Mr. Henry Rotich</td>
</tr>
<tr>
<td>3.</td>
<td>Devolution and Planning</td>
<td>Ms. Ann Waiguru</td>
</tr>
<tr>
<td>4.</td>
<td>Land, Housing and Urban Development</td>
<td>Ms. Charity Ngilu</td>
</tr>
<tr>
<td>5.</td>
<td>Transport and Infrastructure</td>
<td>Mr. Michael Kamau</td>
</tr>
<tr>
<td>6.</td>
<td>Interior and Coordination of National Government</td>
<td>Mr. Joseph Ole Senku</td>
</tr>
<tr>
<td>7.</td>
<td>Defence</td>
<td>Mrs. Raychelle Omamo</td>
</tr>
<tr>
<td>8.</td>
<td>Foreign Affairs</td>
<td>Mrs. Amina Mohammed</td>
</tr>
<tr>
<td>9.</td>
<td>Education, Science and Technology</td>
<td>Prof. Jacob Kaimenyi</td>
</tr>
<tr>
<td>10.</td>
<td>Health</td>
<td>Mr. James Wanaina</td>
</tr>
<tr>
<td>11.</td>
<td>Environment, Water and Natural Resources</td>
<td>Prof. Judy Wakhungu</td>
</tr>
<tr>
<td>12.</td>
<td>Information, Communication and Technology</td>
<td>Mr. Fred Matiangi</td>
</tr>
<tr>
<td>13.</td>
<td>Sports, Culture and Arts</td>
<td>Mr. Hassan Wario</td>
</tr>
<tr>
<td>14.</td>
<td>Labour, Social Security and Services</td>
<td>Mr. Kazungu Kambi</td>
</tr>
<tr>
<td>15.</td>
<td>Mining</td>
<td>Mr. Najib Balala</td>
</tr>
<tr>
<td>16.</td>
<td>Energy and Petroleum</td>
<td>Mr. Davis Chirchir</td>
</tr>
<tr>
<td>17.</td>
<td>Industrialisation and Enterprise Development</td>
<td>Mr. Adan Mohammed</td>
</tr>
<tr>
<td>18.</td>
<td>East African Affairs, Commerce and Tourism</td>
<td>Ms Phyllis Kandie</td>
</tr>
</tbody>
</table>
1.5.2 **Legislature**

Parliament has two houses, the National Assembly and the Senate:

- **The National Assembly** consists of 290 members elected by the registered voters of each constituency, 47 women elected from every county and the Speaker; and
- **The Senate** comprises of 47 elected members from the counties, 16 nominated women, 2 nominated representatives of the youth, 2 representatives of persons with disabilities and the Speaker.

1.5.3 **Judiciary**

The judiciary consists of:

- The Supreme Court\(^{72}\);
- the Court of Appeal\(^{73}\);
- the High Court\(^{74}\); and
- the Subordinate Courts. The subordinate courts are the Magistrates’ Courts, the Kadhis’ Courts, the Courts Martial and Tribunals.\(^{75}\)

1.5.4 **Devolved structure of government**

*Please see above at 1.2.3.2 - Constitutional provisions on devolution.*

The Constitution of 2010 in Article 184 provides for the enactment of a national legislation to provide for the governance and management of urban areas and cities. The said legislation is contemplated to, *inter alia*, establish criteria for classifying areas as urban areas and cities, establish mechanisms for identifying different categories of urban areas and cities and their governance, establish the principles of governance and management of urban areas and cities, and, provide for participation by residents in the governance of urban areas and cities.

Consequently, the Urban Areas and Cities Act (No. 13 of 2011) was enacted in 2011 within the time frame stipulated in the 5\(^{th}\) Schedule of the Constitution. It became effective after the general elections

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\(^{72}\) Constitution, Article 163.

\(^{73}\) Constitution, Article 164.

\(^{74}\) Constitution, Article 165.

\(^{75}\) See Articles 84, 163, 164, 165, 169 of the Constitution of Kenya.
held on 4th March 2013. The Act defines a City as an urban area\textsuperscript{76} with a population of at least five thousand residents and has been conferred the status of a city by the \textit{Urban Areas and Cities Act (No. 13 of 2011)}.\textsuperscript{77} On the other hand, a municipality defined as a town with a population of at least two hundred and fifty thousand residents and has been conferred the status of a municipality in accordance with the provisions of the \textit{Urban Areas and Cities Act (No. 13 of 2011)}.\textsuperscript{78}

The management of a city or a municipality is vested in the county government and administered on its behalf by a board\textsuperscript{79}, a manager\textsuperscript{80} and such other staff as the county public service may determine.\textsuperscript{81}

The functions of the board are to, \textit{inter alia}\textsuperscript{82}:

\begin{itemize}
\item[a)] Exercise executive authority as delegated by the county executive;
\item[b)] Ensure provision of services to its residents through developing and adopting policies, plans, strategies and programmes;
\item[c)] Control land use, land sub-division, and land development and zoning within the spatial and master plans of the city or municipality;
\item[d)] Promote safe and healthy environment;
\item[e)] Undertake infrastructural development as delegated by the county government;
\item[f)] Enter into contracts, partnerships or joint ventures as it may consider necessary for discharge of its functions;
\item[g)] Implement county and applicable national legislation;
\item[h)] Impose rates, taxes, duties, fees, and surcharges on fees as authorised by the county government for delivery of services by the municipality or city;
\item[i)] Settle and implement tariff, rates and tax and debt collection policies as delegated by the county government; and
\item[j)] Make by-laws.
\end{itemize}

\textsuperscript{76} An urban area is defined as a municipality or a town under Article 8 of the Urban Areas and Cities Act (No. 13 of 2011).

\textsuperscript{77} Section 5 of the Urban Areas and Cities Act (No. 13 of 2011).

\textsuperscript{78} Section 9 of the Urban Areas and Cities Act (No. 13 of 2011).

\textsuperscript{79} The said board shall be a body corporate with perpetual succession and a common seal. The said board should not have more that eleven members. At least five members of the said board shall be nominated by the private sector association, informal sector association, registered neighborhood associations and an association of urban areas and cities. Six of the said members are appointed through a competitive process by the County Executive Committee, with the approval of the County Assembly. See Articles 12(2) and 13 of the Urban Areas and Cities Act (No. 13 of 2011).

\textsuperscript{80} According to Article 28 of the Urban Areas and Cities Act (No. 13 of 2011), the manager is responsible for implementing the decisions and functions of the board and is answerable to the board.

\textsuperscript{81} Article 12(1) of the Urban Areas and Cities Act (No. 13 of 2011).

\textsuperscript{82} Article 20 and 21 of the Urban Areas and Cities Act (No. 13 of 2011).
The governance and management of the city is in accordance with the County Government Act (No. 17 of 2012).

If an area is granted a status of a town, it shall not be a body corporate. Every town shall have an administrator whose functions are determined by a committee appointed by the county governor and approved by the county assembly. The committee performs the same functions as those of a board of a municipality or a town.
OVERVIEW OF LAWS, POLICIES AND INSTITUTIONS RELEVANT TO REDD+ IN KENYA

2.1 Land law and policy

2.1.1 Recent changes to Kenya’s land law regime

The issue of land rights is highly contested in Kenyan politics. Boone states that “throughout Kenya’s history, land politics and policy have revolved around debates over whose rights are to be recognized by the state” and questions the level of consensus around Kenya’s revised land policy. Harbeson has also questioned how effective the new land regime outlined in the Constitution of 2010 will be, noting Kenya’s turbulent history of land administration. Commentators note that land ownership, use and management was one of the key issues prompting the development of the new Constitution.

The Land Policy of 2007 was developed through a very consultative process. Stakeholders from the public and private sector as well as civil society were involved in the process. The aim of the National Land Policy is to guide the country towards efficient, sustainable and equitable use of land for prosperity and posterity. In addition, it addresses historical land injustices, land rights of minority communities as well as vulnerable groups. The provisions of the National Land Policy, the Constitution of 2010 and the new land Acts are similar. This therefore implies that the National Land Policy guided the drafters of the new land Acts as well as the land provisions in the current Constitution.

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85 Ibid, paragraph 4.


88 See http://www.lands.go.ke for a copy of the National Land Policy.
Sign claiming ownership of land in Nairobi.

Signs claiming ownership of land are common in Nairobi. Challenges associated with the land registry system mean that land tenure and ownership rights can appear unclear and be subject to multiple claims (including fraudulent ones).

Land status signs for sale beside the road, Nairobi.

A street-side vendor selling a large number of different signs used for displaying the ownership of land. The sign declaring 'This plot is not for sale' is used to prevent fraudulent transactions – for example, land might be advertised for sale by parties who do not actually hold the land rights.

A 'Green Belt Movement' sign protecting a public playground, Nairobi.

This photograph shows public land used for a children’s playground in downtown Nairobi. A representative of the school (anon) told the photographer that this sign was erected to stop prospective real estate developers from claiming the space as private land.
Land ownership, use and management was one of the issues addressed by Kenya’s new Constitution. Pursuant to the Constitution of 2010, 3 new Acts of Parliament came into force on May 2, 2012:

- The Land Act No. 6 of 2012;
- The Land Registration Act No. 3 of 2012; and
- The National Land Commission Act No. 5 of 2012.

These replaced the following repealed laws:

- The Indian Transfer of Property Act 1882;
- The Government Lands Act (Chapter 280 of the Laws of Kenya);
- The Registration of Titles Act (Chapter 281 of the Laws of Kenya);
- The Land Titles Act (Chapter 282 of the Laws of Kenya);
- The Registered Land Act (Chapter 300 of the Laws of Kenya);
- The Wayleaves Act (Chapter 292 of the Laws of Kenya); and
- The Land Acquisition Act (Chapter 295 of the Laws of Kenya)

The new land laws have created the following noteworthy changes:

- One Land Registry and one land registration system (not yet implemented);
- Titles to be called ‘certificates of lease’ or ‘certificates of title’ (not yet implemented);
- Three categories of land: public land, community land and private land;
- New legal treatment of non-Kenyan citizens;
- Consent of spouses to certain transactions;
- Creation of the Land and Environment Court;
- New formats for documents (new forms have not yet been prescribed, and old forms are still in use); and
- Creation of the National Land Commission.

Changes have not been fully implemented, creating uncertainty within Kenya’s land law and administration.

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90 Ibid.
91 Ibid.
2.1.2 Key laws governing land

2.1.2.1 The Constitution

Chapter 5 of the Constitution of 2010 deals with Land and Environment. Article 60 articulates the principles of land policy and holds that land should be “held, used and managed in a manner that is equitable, efficient, productive and sustainable.”

Principles of land policy include:
- Security of land rights;
- Sustainable and productive management of land resources; and
- Sound conservation and protection of ecologically sensitive areas.

Chapter 5 of the Constitution of 2010, Article 66, gives the State the authority to regulate “the use of any land, or any interest in or right over any land, in the interest of defence, public safety, public order, public morality, public health, or land use planning.”

2.1.2.2 Land Act 2012

This is an Act of Parliament enacted to revise, consolidate and rationalize land law, to provide for the sustainable administration and management of land and land based resources, and for connected purposes.

2.1.2.3 Land Registration Act 2012

This is an Act of Parliament enacted to revise, consolidate and rationalize the registration of titles to land, to give effect to the principles and objects of devolved government in land registration, and for connected purposes.

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93 Constitution of Kenya 2010, Article 60(1).
94 Ibid, Article 60(1)(b).
95 Ibid, Article 60(1)(c).
96 Ibid, Article 60(1)(e).
97 Ibid, Article 66(1).
98 Act No.6 of 2012.
99 Act No.3 of 2012.
2.1.2.4  National Land Commission Act 2012

The National Land Commission is established by Article 67 of the Constitution. The National Land Commission Act makes further provision as to, inter alia, the functions and powers of the National Land Commission, qualifications and procedures for appointments to the Commission and gives effect to the objects and principles of devolved government in land management and administration.

2.1.2.5  Trust Lands Act 1970/Revised 2009

This is an Act of Parliament to make provision for Trust Land (Chapter 288 of the Laws of Kenya).

Part IV of the Act provides for setting apart of land by the Government or local authorities and the payment of compensation to the affected parties. Under Section 4 of the Act, a local authority is empowered to divide the Trust land vested in it into such divisions as appear to it to be necessary or expedient for proper administration and each such division is governed by a Divisional Land Board which is headed by a chairman who is appointed by the Cabinet Secretary responsible for land. Section 8 of the Act provides for payment of full compensation which must be prompt. Section 10 of the Act provides that any person who is dissatisfied with the award of compensation may appeal to the Provincial Agricultural Board of the province where the land to be set aside and the final appeal lies in the High Court. Section 12 guarantees the right of access to the High Court to any person claiming a right or interest in land set apart for the determination of the legality of the setting apart and obtaining prompt payment of any compensation awarded.

2.1.2.6  Land Control Act 1967/Revised 2010

This is an Act of Parliament enacted to control dealings in agricultural land (Chapter 302 of the Laws of Kenya).

Section 2 of the Act defines Agricultural Land as land that is not within a municipality, township, urban centre or market. The Cabinet Secretary in charge of land housing and urban development can, however, declare by notice in the Gazette a land within a municipality, township, urban centre or market as agricultural land.

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100 Act No.5 of 2012.

101 See Article 67(3) of the Constitution of Kenya.
The Land Control Board\(^{102}\) of every land control area is responsible for the issuance of the Land Control Board consent to land owners\(^{103}\) with regard to transactions that require their consent.\(^{104}\) If the consent is not obtained, the transaction is deemed void. The decision of the Land Control Board is based on considerations laid down in Section 9 of the Act. They include, \textit{inter alia}, whether the intended purchaser is likely to farm the land, use the land profitably or already has sufficient agricultural land.\(^{105}\) The decision of the Land Control Board can be appealed to the provincial land control appeals board or the central land control appeals board.\(^{106}\)

2.1.2.7 \textit{Land (Group Representatives) Act 1970/Revised 2012}

This is an Act of Parliament to provide for the incorporation of representatives of groups who have been recorded as owners of land under the Land Adjudication Act, and for purposes connected therewith (Chapter 287 of the Laws of Kenya).

2.1.2.8 \textit{Land Adjudication Act 1977/Revised 2010}

This is an Act of Parliament to provide for the ascertainmen and recording of rights and interests in Trust land, and for connected purposes. It governs Trust Land. It is contained in Chapter 284 of the Laws of Kenya.

2.1.2.9 \textit{Land Consolidation Act 1977/Revised 2012}

This is an Act of Parliament to provide for the ascertainment of rights and interests in, and for the consolidation of, land in the special areas, and for the registration of title to, and of transactions and

\(^{102}\) The membership of the Land Control Board is provided in the schedule of the Land Control Act 1967 (revised 2010), Chapter 302 of the Laws of Kenya.

\(^{103}\) Land owners include individuals as well as companies and cooperative societies. Hence, if a private company or cooperative society owns agricultural land, it cannot issue, sale, transfer, mortgage or carry out any other disposal of or dealing with any of its shares without the consent of the Land Control Board of the area where the land is situated. See section 6(1)(c) of the Land Control Act.

\(^{104}\) The landowner applies for the consent using prescribed forms. The Land Control Act 1967/revised 2010 at Section 6 gives details of the transactions that require the consent of the Land Control Board. They include sale, transfer, lease, mortgage, subdivision and declaration of trust of agricultural land. However, consent of the Land Control Board is not needed for transmission of land by virtue of a will (testate succession), provided that no subdivision of the land is undertaken and the Government is not a Party to the transaction.


devolutions affecting, such land and other land in the special areas and for connected purposes. It governs Trust Land. It is contained in Chapter 283 of the Laws of Kenya.

2.1.2.10 Environmental Management and Coordination Act 1999/Revised 2012

The purpose of the Environmental Management and Coordination Act, as stated in its preamble, is “to provide for the establishment of an appropriate legal and institutional framework for the management of the environment in Kenya and for matters connected therewith and incidental thereto.”

Prior to 1999, a prominent feature of Kenya’s environmental legislation was its diffuse nature – sectoral legislation contained environmental management components formulated “largely in line with natural resource sectors.” The Environmental Management and Coordination Act is “based on the recognition that improved coordination of the diverse sectoral initiatives is necessary for better management of the environment.”

It is the main Act of Parliament in Kenya that deals with the management of the environment. It contains 148 sections, schedules, and subsidiary legislations. A large section of the EMCA contains provisions that create institutions for environmental management. Apart from the establishment of these institutions, EMCA also contains provisions on the protection of biological diversity, resources, the coastal zone, and the ozone. The EMCA also consists of subsidiary legislation.

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107 The Interpretation and General Provisions Act defines “the special areas” as ‘areas of land the boundaries of which are for the time being set out in the First Schedule to the Trust Land Act (Cap. 288) as it stood immediately before 1st June, 1963.’


111 See further Section 4.3 regarding institutions under EMCA.


113 Section 51 and 52, Environmental Management and Coordination Act, Act No 8 of 1999.


116 This includes the following:
   - The Environmental Management And Coordination (Public Complaints Committee) Regulations, 2012;
The EMCA requires that ‘any written law, in force immediately before the coming into force of this Act relating to the management of the environment shall have effect subject to modification as may be necessary to give effect to this Act, and where the provisions of any such law conflict with any provisions of this Act, the provisions of this act will prevail.’\textsuperscript{117} The Water Act, Forests Act, Energy Act and Wildlife Management and Conservation Act were revised after the EMCA came into force.\textsuperscript{118}

A court may, on an application made by any person or a group of persons grant an environmental easement. The court may impose such conditions on the grant of an environmental easement as it considers to be best calculated to advance the object of an environmental easement\textsuperscript{119}. The object of an environmental easement is to further the principles of environmental management by facilitating the conservation and enhancement of the environment.\textsuperscript{120}

\textbf{It is important to note that the Environmental Management and Coordination (Amendment) Bill 2013 would amend EMCA if passed into law. At the time of writing, this bill is currently undergoing internal review and stakeholder consultation.}

\textbf{2.1.2.11 Forests Act 2005/Revised 2012}

In brief, this is an Act of Parliament to provide for the establishment, development and sustainable management, including conservation and rational utilization of forest resources for the socio-

\begin{itemize}
  \item The Environmental Management And Coordination (Noise And Excessive Vibration Pollution) (Control) Regulations, 2009;
  \item The Environmental Management And Coordination (Wetlands, River Banks, Lake Shores And Sea Shore Management) Regulations, 2009;
  \item The Environmental Management And Coordination (Conservation Of Biological Diversity And Resources, Access To Genetic Resources And Benefit Sharing) Regulations, 2006;
  \item Environmental Management And Co-ordination (Fossil Fuel Emission Control) Regulations, 2006;
  \item The Environmental Management And Coordination, (Waste Management) Regulations, 2006;
  \item Environmental Management And Coordination (Waste Management) Regulations 2006;
  \item The Environmental Management And Coordination (Water Quality) Regulations, 2006;
  \item The Environmental Management And Coordination (Water Quality) Regulations, 2006;
  \item The National Environmental Tribunal, Procedure Rules, 2003;
  \item The Environmental (Impact Assessment and Audit) Regulations, 2003; and
  \item The Environmental (Impact Assessment and Audit) Regulations, 2003.
\end{itemize}

\textsuperscript{117} Environmental Management and Coordination Act, Act No 8 of 1999, Section 148.


\textsuperscript{119} Section 113, Wildlife (Conservation and Management) Act, Cap 376.

\textsuperscript{120} Section 112 Wildlife (Conservation and Management) Act, Cap 376.
economic development of the country. Section 2 of the Act provides that the Act shall apply to all forests and woodlands on State, local authority and private land.

It is important to note that the current Forest Conservation and Management Bill 2014 would, if passed into law, update the Forests Act.

For more detail about the Forests Act and the Forest Conservation and Management Bill, please refer to Section 2.2.3.3 below (under Statutory law with respect to the environment).
2.1.3 **Land classifications**

2.1.3.1 **Overview**

Chapter 5 of the *Constitution of 2010* Article 62 states that “all land in Kenya belongs to the people of Kenya collectively as a nation, as communities and as individuals.”\(^\text{121}\) Thus, land is classified as public land, private land and community land.\(^\text{122}\)

The historical issues surrounding land were very important in framing the discourse leading up to the *Constitution of 2010*. Under Article 60, Land is to be held and used in accordance to principles of equitable access, security of land rights and elimination of gender discrimination in law, customs and practices related to land and property in Land. Article 61 provides that land belongs to the people of Kenya collectively as a nation, as communities and as individuals and classifies land into public land, community land or private land.

The definition of **Public Land** includes all minerals and mineral oils, government forests, game reserves rivers and lakes *inter alia*. Article 62 (2) vests public land in the County Government in trust for the people resident in the county and the land is to be administered by the National Land Commission. This provision removes the administration of public land from the powers of the President.

In regard to **Community Land**, Article 63 of the *Constitution* provides that it shall vest in and be held by communities identified on the basis of ethnicity, culture or similar community of interest. The definition of community land includes land lawfully registered in the name of the group representatives, land declared to be community land by an Act of Parliament and community forests, grazing areas or shrines and ancestral lands and lands traditionally occupied by hunter-gatherer communities.

**Private Land** is defined under Article 64 of the *Constitution* as registered land held by any person under freehold or leasehold tenure.

Article 65 limits landholding by non citizens by providing that a person who is not a citizen may hold land on the basis of leasehold tenure only and any such lease shall not exceed ninety nine years. Article 65 (2) provides that a body corporate shall be regarded as a citizen only if the body corporate is wholly owned by one or more citizens.

\(^\text{121}\) Constitution of Kenya 2010, Article 61(2).

\(^\text{122}\) Constitution of Kenya 2010, Article 60(2).
Public land is described by Article 62 of the Constitution:

(1) Public land is—

(a) land which at the effective date was unalienated government land as defined by an Act of Parliament in force at the effective date;
(b) land lawfully held, used or occupied by any State organ, except any such land that is occupied by the State organ as lessee under a private lease;
(c) land transferred to the State by way of sale, reversion or surrender;
(d) land in respect of which no individual or community ownership can be established by any legal process;
(e) land in respect of which no heir can be identified by any legal process;
(f) all minerals and mineral oils as defined by law;
(g) government forests other than forests to which Article 63 (2) (d) (i) applies, government game reserves, water catchment areas, national parks, government animal sanctuaries, and specially protected areas;
(h) all roads and thoroughfares provided for by an Act of Parliament;
(i) all rivers, lakes and other water bodies as defined by an Act of Parliament;
(j) the territorial sea, the exclusive economic zone and the sea bed;
(k) the continental shelf;
(l) all land between the high and low water marks;
(m) any land not classified as private or community land under this Constitution; and
(n) any other land declared to be public land by an Act of Parliament—
   (i) in force at the effective date; or
   (ii) enacted after the effective date.

(2) Public land shall vest in and be held by a county government in trust for the people resident in the county, and shall be administered on their behalf by the National Land Commission, if it is classified under—

(a) clause (1) (a), (c), (d) or (e); and

(b) clause (1) (b), other than land held, used or occupied by a national State organ.

(3) Public land classified under clause (1) (f) to (m) shall vest in and be held by the national government in trust for the people of Kenya and shall be administered on their behalf by the National Land Commission.

(4) Public land shall not be disposed of or otherwise used except in terms of an Act of Parliament specifying the nature and terms of that disposal or use.

Read together, these provisions of the Constitution show that Public Land will either be held by the National Government or by the County Government on behalf of the people of the County and, in both instances, it is to be administered by the National Land Commission which is also authorized to devolve into County Land Commissions under Section 15(5) of the National Land Commission Act. Considering the definitions of Land and unexhausted improvement, the National Land Commission will be expected to administer not only the land but also the fixtures and other features on the land.

123 Which shall in consultation and cooperation with the national and country governments establish County Land Management Boards for the purposes of managing such public land under section 8(1) of the National Land Commission Act.
Community land is described by Article 63 of the Constitution:

(1) Community land shall vest in and be held by communities identified on the basis of ethnicity, culture or similar community of interest.

(2) Community land consists of—
   (a) land lawfully registered in the name of group representatives under the provisions of any law;
   (b) land lawfully transferred to a specific community by any process of law;
   (c) any other land declared to be community land by an Act of Parliament; and
   (d) land that is—
      (i) 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; or
      (iii) lawfully held as trust land by the county governments, but not including any public land held in trust by the county government under Article 62 (2).

(3) Any unregistered community land shall be held in trust by county governments on behalf of the communities for which it is held.

(4) Community land shall not be disposed of or otherwise used except in terms of legislation specifying the nature and extent of the rights of members of each community individually and collectively.

(5) Parliament shall enact legislation to give effect to this Article.

On 2nd May 2012, the Land Act, National Land Commission Act and Land Registration Act came into force. These new laws give effect to the aspirations set out in Part Five of the Constitution. The National Land Commission Act and the Land Registration Act define a community as a clearly defined group of users of land identified on the basis of ethnicity, culture or similar community of interest, holding a set of clearly defined rights and obligations over land and land-based resources.124

There are two types of community land:

- **Unregistered community land:** The National Land Commission is mandated under Section 5 of the National Land Commission Act to manage and administer all unregistered community land on behalf of the County Government.

- **Registered community land:** Registered community land is elaborately provided for under the Land (Group Representatives) Act. This Act derives its definition of “group” from the Land Adjudication Act: “a tribe, a clan, section, family or other group of persons, whose land under recognized customary law belongs communally to the persons who are for the time being members of the group, together with any person of whose land the group is determined to be the owner.” 125
  - The Land (Group Representatives) Act provides for incorporation of Group Representatives in a procedure in which an identified group elects not more than ten

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124 Section 2(1) of the National Land Commission Act, and Section 2 of the Land Registration Act.
125 Section 2 of the Land Adjudication Act.
and not less than three persons to be group representatives of the group. The said Group representatives are incorporated, they have perpetual succession with power to sue and be sued in their corporate name and to acquire, hold, charge and dispose of the group’s property. Any money that needs to be distributed to the group members would need to be paid to the group representatives who would then distribute it to the group members.

- Section 37 of the Land Act and Section 8 of the Land Registration Act envisage a new ‘Community Land Act’ to be enacted by Parliament. This Act has not yet been enacted. Section 8 of the Land Registration Act requires that a community land register be kept in each registration unit containing inter alia a cadastral map showing the extent of the community land and identified areas of common interest, the name of the community having an interest in the land, the name and identity of the members of the group and the group representatives. The Section further provides that any instrument purporting to dispose of rights or interest in community land must comply with the law relating to community land.

Community land shall vest in and be held by communities identified on the basis of ethnicity, culture or similar community of interest and that Community land shall not be disposed of or otherwise used except in terms of legislation specifying the nature and extent of the rights of members of each community individually and collectively.

2.1.3.4 Private land

Private land is described by Article 64 of the Constitution:

Private land consists of —

(a) registered land held by any person under any freehold tenure;

(b) land held by any person under leasehold tenure; and

(c) any other land declared private land under an Act of Parliament.

Section 2 of the Land Act defines freehold tenure as:

...the unlimited right to use and dispose of land in perpetuity subject to the rights of others and the regulatory powers if the national government, county government and other relevant state organs.

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126 Section 8 Land (Group Representatives) Act.
Freehold tenure is therefore the largest quantity of land rights which the state can grant to an individual as it confers unlimited rights of use, abuse and disposition subject to the above stated regulatory powers of the states and the rights of other persons (such as a wife).  

Section 2 of the Land Act defines a Lease as

...the grant, with or without consideration, by the proprietor of land of the right to the exclusive possession of his or her land, and includes the right so granted and the instrument granting it, and also includes as sublease but does not include an agreement for lease.

Hence, leasehold tenure is the right to use land for a defined period of time in exchange for the performance of certain obligations contained in the lease such as payment of rent. The duration of leases should not exceed 99 years for non-citizens.

Any other land declared private under an Act of Parliament could include land converted from one category of land classification to private land. This is as per Section 9 (2 a) of the Land Act which states *inter alia* that public land may be converted to private land by alienation. Section 9 (2 d) further states that community land may be converted to either private or public land in accordance with the law relating to community land. It should however be noted that any substantial transaction involving the conversion of public land to private land shall require approval of the National Assembly or County Assembly depending on whether the land is held in trust by county government for the people of the County or by the national government for the people of Kenya.

Section 24 of the Land Registration Act provides that the registration of a person as the proprietor of the land shall vest in that person the absolute ownership of that land together with all associated rights and privileges. Section 25 provides that the rights of a proprietor whether acquired on a first registration or subsequently for valuable consideration or by an order of the Court shall be indefeasible (ie. cannot be annulled or voided). Nevertheless, these rights are subject to overriding interests which need not be noted on the register and the said overriding interests are set out in Section 28 of the Land Registration Act.

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128 Article 65(1) of the Constitution of Kenya.
129 Article 61(2) of the Constitution classifies land as either public, private or community land.
130 See Article 62(2) and 62(3) of the Constitution of Kenya.
The **Land Act** and the **Land Registration Act** make specific provisions on administration and management of private land. Contracts over land must be in writing, signed and witnessed. A land transfer is completed by the registration of the Transferee as proprietor of the land and a transfer takes effect immediately.

### 2.1.3.5 Procedure to acquire private land

In practice, the procedure for acquiring an interest in private land is to enter into a contract for the sale and purchase of the land with a defined completion period. The process is subject to freedom of contract but there are also guidelines from the Law Society of Kenya (LSK), set out in the Law Society of Kenya Conditions of Sale, to guide legal practitioners facilitating land transactions. The key stages are as follows:

1) Payment of the deposit and signing of the sale agreement;
2) Preparation to complete;
3) Completion; and
4) Registration.

### 2.1.3.6 Compulsory acquisition

Article 40 of the **Constitution** provides that every person has the right to acquire and own property anywhere in Kenya either individually or in association with others. Nevertheless, the State reserves the right to compulsorily acquire property subject to compensating the owner in accordance with the **Constitution** and the **Land Act**. The right of compulsory acquisition is an overriding interest under Section 28 of the **Land Registration Act**.

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*Public access road joining villages to a main highway (Great Rift Valley region).*

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131 Section 38.
# Overview of Kenya’s Land Regime Under the Constitution of 2010

<table>
<thead>
<tr>
<th>Category of Land</th>
<th>Private Land</th>
<th>Public Land</th>
<th>Community Land</th>
</tr>
</thead>
</table>
| **KEY LAWS APPLICABLE TO EACH CATEGORY OF LAND** | Land Act (Act No.6 of 2012)  
Land Registration Act (Act No.3 of 2012)  
Land Control Act 1967  
National Land Commission Act (Act No. 5 of 2012) 2012  
Environmental Management and Coordination Act (Act No.8 of 1999)/Revised 2012  
Forests Act (Act No. 7 of 2005)/Revised 2012: Section 2 of the Act provides that the Act shall apply to all forests and woodlands on private land. | Land Act (Act No.6 of 2012)  
Land Registration Act (Act No.3 of 2012)  
Land Control Act 1967/Revised 2010  
National Land Commission Act (Act No. 5 of 2012)  
Environmental Management and Coordination Act (Act No.8 of 1999)/Revised 2012  
Forests Act (No. 7 of 2005)/Revised 2012: Section 2 provides that this Act shall apply to all forests and woodlands on State and local authority land.  
Wildlife (Conservation and Management) Act 2013 | New Community Land Act (TBC). In lieu of this new Act, existing law applies:  
- Land Act 2012  
- Land Registration Act 2012  
- Land Control Act 1967  
- National Land Commission Act 2012  
- Trust Lands Act, Chapter 288/Revised 2009  
- Land (Group Representatives) Act, Chapter 287/Revised 2012.  
- Land Adjudication Act, Chapter 284/Revised 2010  
- Land Consolidation Act, Chapter 283/Revised 2012  
- Environmental Management and Coordination Act (Act No.8 of 1999)/Revised 2012. |

**FOREST LAND**

- Forests Act (No. 7 of 2005)/Revised 2012  
- Environmental Management and Coordination Act (No.8 of 1999)/Revised 2012  
- Wildlife (Conservation and Management) Act 2013
2.1.3.7 Forest land

2.1.3.7a Forest regime

Kenya’s forest management regime consists of:
- Forests Act 2005 (and new Forest Conservation and Management Bill 2014);
- Forest Charcoal Regulations;
- Timber Act 1972/Revised 2012; and

2.1.3.7b Forest definition

The Forests Act, under section 3 (the interpretations section) does not define a forest in terms of its biological composition; instead, it defines a *forest area*:

*forest area* means any land declared to be a forest land under this Act.

A *gazetted forest* refers to an area which has qualified as a forest and been published in the Kenya Gazette to be a forest under the authority of the Minister in charge, and in accordance with the Forests Act. For example:

- Section 23 (regarding the creation of state forests) provides that the Minister may, on the recommendation of the Board, by notice in the Gazette declare a forest from un-alienated land or land which has been acquired by the Government. The procedure of publishing a gazette notice also happens in cases where the Minister is declaring a provisional forest upon recommendation by the board of the Kenya Forest Service\(^\text{132}\);
- The Minister declares a forest from a donation or bequests. In this regard, one may grant land to be a forest to the government or its institutions\(^\text{133}\);
- When a recommendation has been made to the Minister by the Kenya Forests Service to declare a forest area because such an area has a particular environmental, cultural, scientific, or other special significance and so it qualifies as a natural reserve. Following such a declaration, the Minister makes a notice by Gazette declaring a natural reserve\(^\text{134}\).

Types of forest (and forest products) identified by the Forests Act include:

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\(^{132}\) Section 26, Forests Act.

\(^{133}\) Section 31, Forests Act.

\(^{134}\) Section 32, Forests Act.
- “indigenous forest” means a forest which has come about by natural regeneration of trees primarily native to Kenya, and includes mangrove and bamboo forests;

- “local authority forest” means any forest situated on trust land which has been set aside as a forest by a local authority pursuant to the provisions of the Trust Land Act (Cap. 289); any arboretum, recreational park or mini-forest created under section 30 of this Act; any forest established as a local authority forest in accordance with the provisions of section 24;

- “plantation forest” means a forest that has been established through afforestation or reforestation for commercial purposes;

- “private forest” refers to any forest owned privately by an individual, institution or body corporate;

- “provisional forest” means any forest which has been declared a provisional forest by the Minister under section 26;

- “state forest” means any forest declared by the Minister to be a central forest, a forest area or nature reserve before the commencement of this Act and which has not ceased to be such a forest or nature reserve; or declared to be a state forest in accordance with the provisions of section 23;

- “woodland” means an open stand of trees less than ten metres tall which has come about by natural regeneration;

- “forest produce” includes bark, animal droppings, beeswax, canes, charcoal, creepers, earth, fibre, firewood, frankincense, fruit, galls, grass, gum, honey, leaves, flowers, limestone, moss, murrum, myrrh, peat, plants, reeds, resin, rushes, rubber, sap, seeds, spices, stones, timber, trees, water, wax, withies, and such other things as may be declared by the Minister to be forest produce for the purpose of this Act.

Forest areas can also be referred to according to their use or status under the Forests Act:

- “concession” means the right of use granted to an individual or organisation in respect of a specified forest area;

- “forest conservancy area” means an area established by the Board under section 13;

- “nature reserve” means an area of land declared to be a nature reserve under section 32;

- “sacred grove” means a grove with religious or cultural significance to a forest community; and

- “protected tree” means any tree or tree species which have been declared under section 34 to be protected.

For the purposes of REDD+, Kenya’s R-PP defines ‘forest’ in the following way:

At present, Kenya reports its forest land to FAO using a minimum crown cover of 10%, minimum height of 5 metres, and minimum area of 0.5 ha. Thus under this definition, bush lands would not be included even though large areas are converted to other uses each year. For a REDD+ mechanism, we propose to define forest at low cover and low height thresholds, e.g., 15% cover and 2 m height, because doing so will
ensure that practically all lands that contain trees will be classified as forest and thus will be eligible for REDD+ incentives either through reduced degradation, reduced deforestation, or enhancement of carbon stocks.  

2.1.3.7c  Forest ownership and use

Ownership of forests is divided into the following categories:

- State forests – The Kenya Forest Service;
- Local Authority Forests – A local authority; and
- Private forests – An individual, association, institution or body corporate.

Several terms pertaining to forest use rights are found in the Article 3 of the Forests Act:

- “concession” means the right of use granted to an individual or organisation in respect of a specified forest area;
- “non-consumptive use” in relation to a forest, means non-extractive use of forest; and
- “forest produce” includes bark, animal droppings, beeswax, canes, charcoal, creepers, earth, fibre, firewood, frankincense, fruit, galls, grass, gum, honey, leaves, flowers, limestone, moss, murrum, myrrh, peat, plants, reeds, resin, rushes, rubber, sap, seeds, spices, stones, timber, trees, water, wax, withies, and such other things as may be declared by the Minister to be forest produce for the purpose of this Act.

2.1.3.7d  Tree tenure

Tree ownership and use rights depend on the classification of land on which they stand and whether trees are indigenous\textsuperscript{136} or planted\textsuperscript{137}. This is illustrated by Article 61(2) of the Constitution (which classifies land in Kenya as either public, private or communal) and Section 3 of the Forest Act\textsuperscript{138} which provides that a forest can either be owned by the State; a private individual, association, institution or body corporate; or, Local Authority. This therefore means that tree ownership can either be Private, Public or Communal.

A preliminary analysis of tree tenure is presented below – however, further investigation of this area of law is required.

Private Forest

Private land is defined by Article 64 of the Constitution as registered land held by any person under freehold or leasehold tenure. According to Section 24 of the Registered Land Act, the registered proprietor of land would be entitled to ownership and use of trees on the land subject to overriding interests.\textsuperscript{139} This is also in accordance with Section 3 of the Forest Act which defines a Private Forest as any forest owned privately by an individual, institution or body corporate.

Even though an individual owns the trees in his private land, the President under Section 34 of the Forest Act has the powers to declare tree, species or family of trees to be protected in the whole country or in specific areas, hence, a person is prevented from felling, damaging or removing any such trees so declared. It is important to note that this provision limits the rights of ownership of private trees.

It should be noted that Section 24 of the Forest Act states that any land under the jurisdiction of a local authority can be declared to be a local authority forest where the land is identified to be an important catchment area, a source of water springs, or is a fragile environment; the land is rich in biodiversity or contains rare, threatened or endangered species; the forest is of cultural or scientific

\textsuperscript{136} Section 3 of the Forest Act defines indigenous forest as a forest which has come about by the natural regeneration of trees primarily native to Kenya, and includes mangrove and bamboo forests.
\textsuperscript{137} Section 3 of the Forest Act defines Plantation Forest as a forest that has been established through Afforestation (the establishment of a tree crop on an area where such trees are absent) or reforestation for commercial purposes.
\textsuperscript{138} Chapter 385 of the Laws of Kenya.
\textsuperscript{139} Section 24 of the Land Registration Act (No.3 of 2012) vests the registered proprietor of a piece of land as the absolute owner of that land together with all rights and privileges belonging or appertaining thereto, subject to overriding interests set out under section 28 of the Land Registration Act.
significance; or, the forest supports an important industry and is a major source of livelihood for the local community. This therefore means that the state can deprive an owner the private property/forest provided Article 40(3) of the Constitution is respected, in particular, prompt payment in full of just compensation.

Public Land

Trees growing in public land belong to the State pursuant to Article 62(1)(g) of the Constitution.

Under Article 62(3) of the Constitution, public land shall vest in and be held by the national government in trust for the people of Kenya and shall be administered on their behalf by the National Land Commission.

Section 5 of the National Land Commission Act empowers the National Land Commission to manage public land on behalf of the national and county government.

Section 4 of the Forests Act establishes the Kenya Forest Service whose function under section 5(a) of the Forests Act is to manage all State forests.

Section 44 of the Environmental Management and Coordination Act empowers the National Environmental Management Authority, in consultation with the relevant lead agencies, to develop, issue and implement regulations, procedures, guidelines and measures for the sustainable use of forests and such regulations, guidelines, procedures and measures shall control the harvesting of forests and any natural resources located in or on a forest so as to protect water catchment areas, prevent soil erosion and regulate human settlement.

Trees situated in public land can either be a state forest or a local authority forest. Section 3 of the Forest Act defines a state forest as “any forest (a) declared by the Minister to be a central forest, a forest area or nature reserve before the commencement of this Act and which has not ceased to be such a forest or nature reserve, or (b) declared to be a state forest in accordance with the provisions of section 23.” A local authority forest is defined by Section 3 of the Forest Act as “(a) any forest situated on trust land which has been set aside as a forest by a local authority pursuant to the provisions of the Trust Land Act; (b) any arboretum, recreational park or mini-forest created under section 30 of this Act; (c) any forest established as a local authority forest in accordance with the provisions of section 24.”
Community Land

Under section 63(1) of the Constitution, community land[^1^1] shall vest in and be held by communities identified on the basis of ethnicity, culture or similar community of interest. Article 63 (2) (d) further provides that community land is land that is lawfully held, managed and used by specific communities as community forests, grazing areas or shrines. Hence, the community would be entitled to ownership and use of trees on the land.

**TREE TENURE IN KENYA**

<table>
<thead>
<tr>
<th></th>
<th>Indigenous trees</th>
<th>Planted Trees</th>
</tr>
</thead>
<tbody>
<tr>
<td>Private land</td>
<td>Registered proprietor, subject to overriding interests.</td>
<td>Registered proprietor, subject to overriding interests</td>
</tr>
<tr>
<td>Public land</td>
<td>National Land Commission</td>
<td>National Land Commission</td>
</tr>
<tr>
<td></td>
<td>The Kenya Forest Service</td>
<td>The Kenya Forest Service</td>
</tr>
<tr>
<td>Community land</td>
<td>Community members</td>
<td>Community members</td>
</tr>
<tr>
<td></td>
<td>The Kenya Forest Service is mandated to manage all provisional forests in consultation with the forest owners.</td>
<td>The Kenya Forest Service is mandated to manage all provisional forests in consultation with the forest owners.</td>
</tr>
<tr>
<td>Designated ‘forest area’ under the Forests Act</td>
<td>The Kenya Forest Service</td>
<td>The Kenya Forest Service</td>
</tr>
</tbody>
</table>

[^1^1]: Article 63(2) of the Constitution defines Community Land as Land lawfully registered in the name of group representatives under the provisions of any law; land lawfully registered to specific community under any process of law; or any other land declared to be Community Land by any Act of Parliament. Further, Article 63(3) provides that any unregistered Community Land shall be held in trust by a County Government on behalf of the communities for which it is held.
Soil tenure

Depending on the scope of permitted REDD+ activities, the ‘trapped’ carbon that will be rewarded under a REDD+ scheme could be sequestered in soil, rather than forest. Regarding the ownership of soil carbon, there are two possible ways under current Kenyan law to characterise it:

a) that soil is part of the land (and so soil tenure runs with land tenure); or

b) that the carbon in the soil has the components of a mineral that is found in the soil but not part of the soil (attracting different ownership rights).

Both possibilities are described below. For the purposes of REDD+, it is likely that soil carbon would be defined as part of the land, rather than as a separate mineral component to it (the latter definition would be better suited to minerals that would be extracted). This issue pertains to the definition of carbon for the purposes of a REDD+ programme or project, and should be clarified in law.

Carbon as part of the soil

If carbon is assumed to be part of the soil, then the guiding principle is that the rights of the land owner with respect to the soil extend to the carbon in the soil. Both the Constitution of 2010 and the general common law support this guiding principle.

Common Law principles are applicable in Kenya by virtue of the Judicature Act\(^{141}\). In particular, a relevant maxim is cuius est solum, eius est usque ad coelum et ad inferos, which is a Latin phrase that means ‘whoever owns the soil is the owner all the way up to the heaven and down to hell.’ Kenyan Law, through the Constitution\(^{142}\), allows this maxim to be applied in the interpretation of property rights and particularly those pertaining to land. Another relevant maxim in this regard is quicquid plantatur solo, solo cedit which is translated to mean that ‘whatever is attached to the land becomes part of the land.’

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\(^{141}\) Judicature Act, Section 3(1)(c), which states subject thereto and so far as those written laws do not extend or apply, the substance of the common law, the doctrines of equity and the statutes of general application in force in England on the 12th August, 1897, and the procedure and practice observed in courts of justice in England at that date … provided that the said common law, doctrines of equity and statutes of general application shall apply so far only as the circumstances of Kenya and its inhabitants permit and subject …

\(^{142}\) Section 260 of the Constitution of Kenya, the interpretations section, states the following:

“land” includes—
(a) the surface of the earth and the subsurface rock;
(b) any body of water on or under the surface;
(c) marine waters in the territorial sea and exclusive economic zone;
(d) natural resources completely contained on or under the surface; and
(e) the air space above the surface.
An absolute regard of the rights assured by the above maxims would mean that carbon found in the soil belongs to the landowner. The Constitution under Article 260\textsuperscript{143} gives further assistance on how to construe rights related to carbon, affirming the common law position as is in the above two Latin maxims\textsuperscript{144}.

**Carbon as a mineral component of the soil**

Despite the fact that the wording of the Constitution in the definition of land and the applicable Latin maxims (described above) point to absolute ownership of soil carbon by the landholder, both statutes and judicial practice under Kenyan Law have shown certain limitations of rights as far as who owns the *components contained in* the soil strata. For instance, the *Petroleum (Exploration and Production) Act*\textsuperscript{145} states that ownership of all petroleum existing in its natural condition *in strata* lying within Kenya and the continental shelf is vested in the Government. This similar limitation exists with regard to a number of other Kenyan statutes\textsuperscript{146}.

As far a judicial practice is concerned, in the case of *Oil Turkana Limited V National Oil Corporation Of Kenya (2013)*\textsuperscript{147}, the court declined the company's claim of absolute ownership of drilling rights as far as the land whose strata oil was discovered was concerned.

*Tsavo region. Carbon can be stored in the soil, as well as trees.*

\textsuperscript{143} *Ibid.*

\textsuperscript{144} *Ibid.*


\textsuperscript{147} *Oil Turkana Limited (Previously Known As Turkana Drilling Consortium Limited) & 3 Others V National Oil Corporation Of Kenya & 4 Others* [2013] eKLR.
2.1.4 **Legal Treatment of Women in Kenyan land law**

Before the Constitution of 2010, discrimination on the basis of gender in matters of personal law was constitutionally sanctioned. Until the 1997 Inter-Parliamentary Parties Group (IPPG) reforms, gender was not a prohibited class of discrimination. In the constitutional reforms leading up to the 1997 general elections, gender was inserted into the Constitution as a prohibited class of discrimination. Nevertheless, the provision was diluted to allow sex discrimination in respect to adoption, marriage, divorce, burial, devolution of property on death and other matters of personal law.\(^{148}\) Article 27 of the Constitution eliminates the discrimination in the private sphere that was previously allowed in the old constitutional framework:

- Article 27(4) is explicit that women and men have the right to equal treatment, including the right to equal opportunities in political, economic and social spheres.

- Article 27(8) provides that the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender. This expands the political space to accommodate more women and the decision-making bodies in which they were previously excluded such as Land Control Boards must now have a significant number of women. In addition, women must be represented at the National Land Commission and the County Land Boards which have oversight over public land.

Further, Article 60 of the Constitution sets out principles of land policy which includes principles that land shall be held, used and managed in a manner that is equitable and that ensures that gender discrimination in law, customs and practices related to land and property in land are eliminated.\(^{149}\)

Article 45 provides that parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage. Article 68 mandates Parliament to enact legislation to regulate recognition and protection of matrimonial property and in particular the matrimonial home during and after the termination of marriage. Parliament is also mandated to enact legislation to protect the dependants of deceased persons holding interests in any land, including the interest of spouses in actual occupation of land.\(^{150}\) As part of its mandate under the Constitution, Parliament enacted the new Land Laws in 2012. Section 4 of the Land Act reiterates the guiding values and principles of land management and administration which is binding on all persons,

\(^{148}\) Section 82(4)(b) of the now repealed Constitution.

\(^{149}\) Constitution of Kenya Article 60 (1)(f).

\(^{150}\) Constitution of Kenya Article 68 (c)(vi).
including the elimination of gender discrimination in laws and practices related to land and property in land and non discrimination and protection of the marginalized.

Section 93 of the Land Registration Act provides that if a spouse obtains land for the co-ownership and use of both spouses (or all the spouses\textsuperscript{151}) there shall be a presumption that the spouses hold the land as joint tenants and the Registrar shall register the spouses as such. Section 93(2) provides that if land is held in the name of one spouse only but the other spouse (or spouses) contribute by their labour or other means to the productivity, upkeep and improvement of the land, that spouse or those spouses shall be deemed by virtue of that labour to have acquired an interest in that land (in the nature of an ownership in common in that land with the spouse who is the registered owner and the rights gained by contribution of the spouse, or spouses, shall be recognized in all cases as if they were registered).

Section 14 of the Matrimonial Property Act (2013) is similar to Section 93(2) of the Land Registration Act with regard to the presumption of joint ownership. Even where these rights are not registered, spousal rights over matrimonial property are protected as overriding interests over registered land which need not be noted on the register of the land.\textsuperscript{152}

In further entrenchment of spousal rights, Section 2 of the Land Act defines matrimonial home as any property that is owned or leased by one or both spouses and occupied by the spouses as their family home.\textsuperscript{153} In addition, Section 12 of the Matrimonial Property Act addresses the rights of spouses to matrimonial property.

\textsuperscript{151} Numerous references to spouses in the Act is a reflection of the recognition of polygamous marriages in Kenyan laws.

\textsuperscript{152} Section 28 of the Land Registration Act.

\textsuperscript{153} In terms of decision making over matrimonial property, Section 78(3) of the Land Act provides that a Charge of a matrimonial home shall be valid only if signed or assented to by the spouse of the Chargor living in the matrimonial home. Section 93 of the Land Registration Act also mandates the Chargee or purchaser of land to inquire whether the spouse or spouses of the Chargor or transferee have consented to the disposition and if land is disposed without these consents, the said disposition will be void at the instance of the spouse who did not consent, even when the Chargee or transferee was deliberately mislead. Some people have tried to defeat these provisions by registering property in the name of companies, in which case spousal consent is unnecessary, but effectively this is only an escape if the couple does not reside on the property. Where the property registered in the name of a company is the family residence, it is nevertheless the matrimonial home and best practice would be to get the consent of both spouses to its disposition.
2.1.5 Land administration

2.1.5.1 National Land Commission

The National Land Commission is established by Article 67(1) of the Constitution. Its functions, according to Article 67(2) of the Constitution, are:

a) to manage public land on behalf of the national and county governments;
b) to recommend a national land policy to the national government;
c) to advise the national government on a comprehensive programme for the registration of title in land throughout Kenya;
d) to conduct research related to land and the use of natural resources, and make recommendations to appropriate authorities;
e) to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress;
f) to encourage the application of traditional dispute resolution mechanisms in land conflicts;
g) to assess tax on land and premiums on immovable property in any area designated by law; and
h) to monitor and have oversight responsibilities over land use planning throughout the country.

The National Land Commission Act makes further provisions as to the functions and powers of the National Land Commission and gives effects to the objects and principles of devolved government in land management and administration. The additional functions of the commission are in Section 5(2) of the National Land Commission Act and include:

a) Alienate public land on behalf of and with the consent of national and county government;
b) Monitor the registration of all rights and interests in land ensure that public land and land under the management of designated state agencies is sustainably managed for their intended purpose and for future generations;
c) Develop and maintain an effective land information management system at national and county levels;
d) Manage and administer all unregistered trust land and unregistered community land on behalf of the county government;
e) Develop and encourage alternative dispute resolution mechanisms in land dispute handling and management; and
f) Ensure that all unregistered land is registered within ten years from the commencement of the Act (a term that can be extended by Parliament).

To enable the National Land Commission to carry out its functions effectively, it may establish offices in the Counties. In addition, the Commission, in consultation and cooperation with the national
and county governments, is required to establish county land management boards for the purposes of managing public land. The main function of the board is to process applications for allocation of land, change and extension of user, subdivision of public land and renewal of leases subject to the physical planning and survey requirements.

2.1.5.2  Environment and Land Court

Article 162 (2b) of the Constitution allows Parliament to 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. In this regard, the Environment and Land Court Act (No. 19 of 2011) was enacted to give effect to the above Article 162 (2b) of the Constitution. The Environment and Land Court has original and appellate jurisdiction to hear and determine all disputes relating to the environment and the use and occupation of, and title, to land. Hence, the court is mandated to hear and determine disputes relating to:

a) Environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
b) Compulsory acquisition of land;
c) Land administration and management;
d) Public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
e) Any other dispute relating to environment and land.

A party to the proceedings may act in person or be represented by a duly authorised representative.

Some of the orders and relief that the court can give include:

a) Interim or permanent preservation orders including injunctions;
b) Prerogative orders;
c) Award of damages;
d) Compensation;

154 Section 18(1) of the National Land Commission Act (No.5 of 2012).
155 Section 19(1) National Land Commission Act (No.5 of 2012).
156 Section 13(2) of the Environment and Land Court Act (No. 19 of 2011).
157 Section 22 of the Environment and Land Court Act (No. 19 of 2011).
158 Section 13(7) of the Environment and Land Court Act (No. 19 of 2011).
e) Specific Performance;
f) Restitution;
g) Declaration; or
h) Costs.

The Court may adopt and implement, on its own motion, with the agreement of or at the request of the parties, any other appropriate means of alternative dispute resolution including conciliation, mediation and traditional dispute resolution mechanisms in accordance with Article 159(2)(c) of the Constitution. 159

To ensure that all citizens are able to access its services, the Court may sit at any place as it deems necessary. 160

Appeals from the court lie with the Court of Appeal. 161

Under Section 31 of the Environment and Land Court Act (No. 19 of 2011), the Land Disputes Tribunal Act (No. 18 of 1990) is repealed.

2.1.5.3 Land Control Board

The Land Control Act (Cap 302 of the Laws of Kenya) controls dealings in agricultural land. Agricultural land is defined in Section 2 of the Act. Agricultural land is basically land that is not within an urban area, that is, a city, municipality or a town. The Cabinet Secretary in charge of Land, Housing and Urban Development may by a gazette notice declare a land that is in an urban area as agricultural land and hence the Act will apply to such land. Transactions that fall under the ambit of the Land Control Act include the sale, transfer, lease, mortgage and subdivision of agricultural land. 162

For any of the above transaction to proceed, the consent of the Land Control Board 163 is required. In addition, if a private company or cooperative society owns agricultural land, it cannot issue, sale, transfer, mortgage or carry out any other disposal of or dealing with any of its shares without the consent of the Land Control Board of the area where the land is situated.

159 Section 20(1) of the Environment and Land Court Act (No. 19 of 2011).
160 Section 26 of the Environment and Land Court Act (No. 19 of 2011).
161 Section 16 of the Environment and Land Court Act (No. 19 of 2011).
162 Section 6(1) of the Land Control Act (Cap 302 of the laws of Kenya).
163 Established under Section 5 of the Land Control Act (Cap 302 of the laws of Kenya).
2.1.5.4  **Group representatives**

With regards to community land, section 5 of the *Land (Group Representatives) Act* (Cap. 287 of the Laws of Kenya) provides for incorporation of Group Representatives in a procedure in which an identified group \(^{164}\) elects not more than ten and not less than three persons to be group representatives of the group. Once the said Group Representatives are incorporated, they have perpetual succession with power to sue and be sued in their corporate name and to acquire, hold, charge and dispose of the group’s property. It should be noted that some land in Kenya is owned under such groups and, as a consequence, governed by the *Land (Group Representatives) Act*.

Every group should maintain a register of its members. The register should contain the name of each member, the date he/she became a member, his/her qualifications for membership and, on his/her ceasing to be a member, the date on which and the circumstances in which he/she ceases to be a member.\(^{165}\)

2.1.5.5  **Corrupt transactions**

Where public land grants or ownership certificates is obtained or induced through corruption linked to any government official or employee of the National Land Commission, the transaction will be void. Any land acquired through a process involving corruption will be forfeited to the Government. “Corruption” is defined by the *Anti-Corruption and Economic Crimes Act 2003*, including ‘breach of trust’ and ‘abuse of office.’\(^{166}\)

2.1.6  **Future challenges for Kenyan land law and governance**

Mona Doshi, a practising land lawyer in Kenya and expert in the field, notes the following challenges to Kenya’s land governance moving forward:

- The new land laws envisage that there will be one land registration system; currently, Kenya has five registration systems and under each system there are different prescribed conveyancing forms to use. On the direction of the Commissioner for Lands, the prescribed

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\(^{164}\) A group is defined by section 2 of the Land Adjudication Act (Chapter 284 of the Laws of Kenya) as “a tribe, a clan, section, family or other group of persons, whose land under recognized customary law belongs communally to the persons who are for the time being members of the group, together with any person of whose land the group is determined to be the owner...”.

\(^{165}\) Section 17(1) of the Land Adjudication Act (Chapter 284 of the Laws of Kenya).

forms are currently being modified by advocates so they conform with the new land laws. As yet, there is no indication when there will be one registration system in place;

- The National Land Commission has recently been constituted. The National Land Commission has a big role in formulating land policies and guidelines in line with the Constitution and they have recently embarked on this task. The National Land Commission will manage, administer and allot public land but as yet there are no policies and guidelines in place relating to how they will carry out their tasks;
- New regulations need to be drafted under the new land laws but this has not yet happened. Therefore, the regulations under the previous repealed Acts are still in force;
- Freehold land titles and leases with an existing term of over 99 years held by non-Kenyan citizens were deemed to become leases of 99 years from the date of the Constitution; however, there is no process for conversion in place so the title deed still reflects the freehold ownership or the 99+ year lease term. The National Land Commission has requested all non-Kenyan citizens to send them copies of title deeds in respect of property they own in Kenya which is freehold or with a leasehold current term of over 99+ years. It is not yet clear what the next steps in the conversion process will be; and
- A category of land classified as community land has been created but there is no new legislation as yet dealing with it. The existing legislation dealing with trust land and group representatives is quite old and thus does not reflect the needs of communities today.

In addition, Professor Kang’ara (Dean of Riara University, Nairobi) observes that

- There is often a disconnect between formal statute law and local practice. Communities might not be aware of formal statutes and caselaw and the gap might not be apparent until a dispute is litigated;
- The Constitution permits the use of customary law in dispute resolution, and it might be useful to review how Kenyan courts interpret, distil and apply customary law principles;
- In the formulation of the new community land statute, comparative examples of how other countries have defined and managed community land might be helpful; and
- With respect to devolution of authority, it is unclear whether this will have a positive or a negative effect on environmental and natural resource management.

Kameri-Mbote argues that “there is a need for innovative approaches in determining access to land and environmental resources for sustainable development,”167 arguing that

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The roles that diverse actors play in land and environmental management should be the key in determining rights to be allocated. In this way the workers on the land and the de facto managers of the environment will be the holders of the rights.\textsuperscript{168}

2.2 Environment laws and regulations

2.2.1 Environmental law and policy in Kenya

2.2.1.1 Introduction to environmental law in Kenya

Even before the enactment of the Constitution of 2010 (which contains an explicit provision regarding the right to environment), the ‘right to life’ was interpreted to protect the ‘right to environment’ by Kenyan courts.\textsuperscript{169} Kameri-Mbote has argued that ‘there is a need for innovative approaches in determining access to land and environmental resources for sustainable development.’\textsuperscript{170}

Kameri-Mbote notes that statute law is the dominant source of Kenya’s environmental law, but both common law and criminal law are also important for environmental governance.\textsuperscript{171}

Judicial review, which assesses the legal validity of actions or decisions of public bodies when they result in injury, can be used to (a) quash a decision, (b) prohibit an unlawful action, (c) require a statutory duty to be performed, (d) declare the legal status of a litigant, (e) award monetary compensation, or (f) declare the existing state of affairs (status quo).\textsuperscript{172} Common law can also be used to establish a cause of action in private law, including trespass, nuisance, negligence and strict liability.\textsuperscript{173} Criminal law can be used to enforce environmental law in order to prevent environmental

\textsuperscript{168} Ibid.


\textsuperscript{172} Ibid, paragraph 4.

harm, protect public health and welfare, and punish violations.\textsuperscript{174} Criminal law can also be used to address the failure of civil/administrative law to deter violations, and criminal sanctions can be used when civil remedies are not suitable or to reflect moral outrage.\textsuperscript{175} Kenya’s criminal law has been used to deal with environmental harms that also constitute criminal activities; in addition, the \textit{Environmental Management and Coordination Act} provides for both substantive and administrative offences.\textsuperscript{176}

International agreements also form part of the environmental regulatory regime in Kenya. Article 2(6) of the \textit{Constitution} states that any treaty or convention ratified by Kenya shall form part of the law of Kenya under this \textit{Constitution}.\textsuperscript{177} Kenya is party to several international and regional treaties related to environmental governance; in addition, Article 71 of the \textit{Constitution} subjects agreements related to natural resources to further scrutiny by the government.

\subsection{2.2.1.2 Overview of environmental policies in Kenya}

Environmental policies are also significant as they establish a framework for implementing the relevant provisions of the \textit{Constitution} and statutory law.

Some of the significant environmental policies are:

\begin{enumerate}
\item \textbf{Vision 2030:}

\textit{Vision 2030}, Kenya’s long-term national planning strategy, includes environmental considerations that inform environmental policies. Increasing forest cover is stated as a goal (consistent with the \textit{Constitution of 2010}), in addition to the harmonisation of environment-related laws for better environmental planning and governance.\textsuperscript{178}

\item \textbf{The National Environmental Policy, 2013:}

It provides the strategy for dealing with the country’s ever-growing environmental issues and challenges such as environmental governance; loss of biodiversity; valuation of environmental and natural resources; rehabilitation and restoration of environmentally degraded areas; urbanisation, waste management and pollution; climate change, energy, security and disaster

\end{enumerate}

\begin{flushleft}
\textsuperscript{174} \textit{Ibid}, pp.455, paragraph 3.  \\
\textsuperscript{175} \textit{Ibid}, pp.455, paragraph 3.  \\
\textsuperscript{176} \textit{Ibid}, pp.455, paragraph 2.  \\
\textsuperscript{177} See further on the section on international agreements, at 4.6.  \\
\textsuperscript{178} Kenya Vision 2030 – the Popular Version, at 5.4.
\end{flushleft}
management; public participation, environmental education and awareness; poverty; data and information; and, chemicals management.  

3. **The Natural Resources Development and Management Policy, 2013:**
The goal of this policy is to provide the framework for ensuring that the provisions of the Constitution with regard to natural resources are realised.  

4. **The National Energy Policy, 2014:**
It pre-supposes the review and amalgamation of the statutes in the energy sector following the adoption of Vision 2030 and the promulgation of the Constitution of 2010.  

5. **The Forest Policy, 2014:**
The Forest Policy 2014 aims to support “sustainable development, management, utilization and conservation of forest resources and equitable sharing of accrued benefits for the present and future generations of the people of Kenya.” It is designed to be consistent with the principles articulated in the Constitution of 2010, and will be implemented via a new forests act (at present, the Forest Conservation and Management Bill 2014 is under discussion for this purpose). This revised policy framework places emphasis on community participation in forestry management (including the recognition of user rights to support sustainable forest conservation and management), including strengthening community forestry associations and introducing benefit-sharing arrangements. It also emphasises the role of both State and non-State actors in the forest sector, and the role of the forest sector in contributing to economic growth and poverty alleviation goals (including the private sector).

### 2.2.2 Constitutional provisions relating to the environment

The sections of the Constitution that touch on the environment and its management include the following:

- Chapter 4 on Fundamental Rights and Freedoms;
- Chapter 5 on Land and the Environment; and
- Chapter 10 on the Judiciary and Schedules 4 and 5.

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182 Ministry of Environment, Water and Natural Resources (Republic of Kenya), *Forest Policy 2014* (February 2014), @ 3.1.

Under Chapter 4, Article 42 of the Constitution states that all Kenyans have a right to a clean and healthy environment. The obligations of the State to ensure that environmental rights are realized are found under chapter 5 of the Constitution. Article 70 of this chapter also gives a right to redress for violation of legal rights. Article 69(b) of the Constitution provides that the State shall strive to ensure that at least 10% of its land surface consists of forest cover.

From the reading of the existing statutes relating to the environment, it is recognisable that there is still a lot to be done in order to come up with an all-encompassing legislation. Section 72 gives parliament the power to make legislation related to the environment within a time frame specified in the 5th Schedule to the Constitution. In particular, and as far as the environment is concerned, the Constitution states under the 5th Schedule that within five years of enactment of the Constitution, an Agreement related to natural resources shall be enacted by parliament. Another key provision related to the environment under the Constitution is Article 162, which states that 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.

It is important to mention the Constitutional provision relating to the distribution of roles between the county and national government as it forms the basis of engagement in the course of implementing any environmental projects. The national government is charged with the protection of the environment and natural resources with a view to establishing a durable and sustainable system of development, including activities such as fishing, hunting and gathering, the protection of animals and wildlife, water and energy. The county governments are responsible for the implementation of specific national government policies on natural resources and environmental conservation, including soil and water conservation and forestry.

### 2.2.3 Statutory law with respect to the environment

#### 2.2.3.1 Environmental Management and Coordination Act

Please see above at 2.1.2.10.

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184 Section 22, 4th Schedule, Constitution of Kenya.
185 Section 10, 4th Schedule, Constitution of Kenya.
186 1999 (Revised 2012) Chapter 387.
2.2.3.2  Environment and Land Court Act\textsuperscript{187} 2011

Please see above at 2.1.5.2.

2.2.3.3  Forests Act 2005

2.2.3.3a  General

The Forests Act brought a ‘paradigm shift in forest management’ by emphasising ‘the principles of public participation in natural resource management.’\textsuperscript{188} It was enacted by Parliament in 2005 to provide for the establishment, development, conservation and rational utilization of forests. The act is divided in four main parts: the preliminary section deals with the establishment section, then the creation and management of forests, community participation\textsuperscript{189}, and enforcement sections.

According to the act, a forest is created by the State upon a declaration published in a Gazette notice. The government creates forests either from alienated land or land that is acquired by government through purchase or otherwise.\textsuperscript{190} The act contains provisions related to the ownership of forests and rights to forest produce.\textsuperscript{191} The act is applied when the forest falls in government or in private land. The section on interpretation (section 3) defines a ‘forest area’ as any area declared as a forest under the act; such declarations follow in the schedule to the act, 10 of which were made in 2013.

Further, section 3, \textit{inter alia}, defines various other terms including deforestation and afforestation.\textsuperscript{192} Section 46 of the Environmental Management and Coordination Act also discusses the afforestation and reforestation of hill tops, hill slopes, and mountainous areas.

\textsuperscript{187} The Environment and Land Court Act, Act No 19 of 2011.

\textsuperscript{188} Tapani Oksanen, Michael Gachanja and Anni Blasten, \textit{Strategy Note for Forest Governance Reform in Kenya (for the Miti Mingi Maisha Bora – Support to Forest Sector reform in Kenya [MMMB] Programme)} Helsinki, April 28, 2011; page 2.

\textsuperscript{189} Provisions include: Article 46(1) – establishment of Community Forest Associations (CFAs) under the Societies Act; Article 47 – functions of CFAs; and, Article 48 – forest user rights.

\textsuperscript{190} The Forests Act (Act Number 7 of 2005), Section 23.

\textsuperscript{191} Per ownership of forest & rights to forest produce: Article 21 – Forests vest in the State except private local authority; Article 24 – Creation of local authority forest; Article 25 – Private forest; Article 32 – Declaration of a nature reserve; and, Article 33 – Special use of nature reserve.

\textsuperscript{192} \textit{Deforestation} means the negative reduction of forest cover from its original status, and \textit{afforestation} means the establishment of a tree crop on an area where such trees are absent.
Under the section on administration, the *Forests Act* establishes the key management agency for forest areas – the Kenya Forests Service (KFS). The KFS is managed by a board that is created under section 6 of the act. The board consists of relevant Ministry officials and several experts. The act also establishes the management fund of the KFS, which is managed by a Financial Committee appointed by the board. The sources of funding are from government, revenue collected from forestry activities, and grants and donations. The *Forests Act* also contains a number of other subsidiary instruments besides those that create forests.\(^{193}\)

2.2.3.3b Establishing a forest conservancy or nature reserve under the Forests Act

The Board of the Kenya Forest Service is mandated to establish forest conservancy areas for the proper and efficient management of forests and may divide such conservancy areas into forest divisions and stations.\(^{194}\) There is a forest conservation committee in each forest conservancy area whose function is to advise the Kenya Forest Service Board on all matters relating to the management and conservation of forests in that area.\(^{195}\)

The Minister responsible for matters relating to the environment upon the recommendation of the Kenya Forest Service may declare any forest area, or woodland or any part thereof, which has a particular environmental, cultural, scientific, or other special significance, to be a nature reserve for the purpose of preserving its biodiversity and natural amenities.\(^{196}\)

If any nature reserve occurs within a private forest, the Minister is required to make such arrangements for compensation to the owner of such forest as may be arrived at by an independent valuer appointed by the Kenya Forest Service Board on the recommendation of the relevant professional body.\(^{197}\)

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\(^{193}\) Some of these subsidiary regulations under the Forests Act include:
- The Forests (Participation in Sustainable Forest Management) Rules, 2009;
- The Forests (Harvesting) Rules, 2009;
- The Forest (Charcoal) Rules, 2009;
- Declaration of a Provisional Forest;
- Declaration of Likia Extension Forest; and
- Declaration of Amara Forest.

\(^{194}\) Section 13 Forests Act.

\(^{195}\) Section 13(3) Forests Act.

\(^{196}\) Section 32 Forests Act.

\(^{197}\) Section 32(2) Forests Act.
2.2.3.3c  Forest Conservation and Management Bill 2014

It is important to note that the current Forest Conservation and Management Bill 2014 would, if passed into law, update the Forests Act. This bill is intended to be the implementing act of the Forestry Policy 20104.

With respect to community participation, the Bill authorises the formation of community forest associations (under the Societies Act), and proceeds to outline the user rights that can be granted to a community forest association by the Government by a Management Agreement.

The relationship between these user rights and REDD+ interventions should be clarified – for example, does section 50(2)(k) stating that forest user rights could include ‘other benefits which may from time to time be agreed upon between an association and the Service’ provide scope for a community forest association to manage a REDD+ intervention? Similarly, would 50(2)(j) allowing for the development of non-wood forest-based industries capture REDD+ projects? **The issue of whether use rights to carbon can be assigned through this mechanism requires attention.**

2.2.2.4  Forest (Charcoal) Regulations 2009

The Forest (Charcoal) Regulations 2009 regulations were made under the Forests Act, with the aim of legitimising sustainable charcoal production. The regulations are intended to limit excessive logging through management and regulation. It is noteworthy that these regulations have received criticism owing to the sharply rising cost of charcoal due to the fact that only specific companies are granted licences.

*A charcoal store in Nairobi. A sack of charcoal costs approximately 1500-1600 Kenyan Shillings (less than $US 20) and is a popular cooking fuel.*

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198 Legal Notice Number 188 of 2009.
199 Forests Act, Act No. 7 of 2005.
200 Mbugua David, Forest Study Outlook in Africa (FOSA), page 28.
**2.2.2.5 Timber Act 1972/Revised 2012**

This is an Act of Parliament to provide for the more effective control of the sale and export of timber; for the grading, inspection and marking of timber; for control of the handling of timber in transit; and for matters incidental to and connected with the foregoing. It is contained in Chapter 386 of the Laws of Kenya.

The Act creates the office of Conservator who is the chief conservator of forests. The Conservator is empowered to authorize any person to be a grader of timber. Section 6 of the Act makes it an offence for any person who is not a grader to mark any timber with a prescribed mark.

Under section 7 of the Act, it is an offence for any person who sells or offers for sale any timber under any name, or colourable imitation which does not comply with the specifications of such grade as so prescribed.

Section 8 of the Act imposes a restriction on export of timber. It makes it an offence for any person to export or enter for export any timber of Kenya origin, except under and in accordance with the terms of an export permit issued by the Conservator or by a person authorized by him in writing.

Section 12 of the Act imposes a general penalty of six thousand shillings or to imprisonment for a term not exceeding six months, or to both a fine and imprisonment, for any person found guilty under the Act.

**2.2.2.6 Wildlife (Conservation and Management) Act 2013**

The *Wildlife (Conservation and Management) Act* No 47 of 2013 repeals the original law adopted in 1976, becoming operational on 10 January 2014. It provides for the protection, conservation, sustainable use and management of wildlife in Kenya and for connected purposes. The Act consolidates and amends the laws relating to the protection, conservation and management of wildlife in Kenya. It also emphasises the devolution of conservation and management of wildlife to landowners/managers by recognising that wildlife conservation is a form of land-use, and aims to provide better access to benefits from wildlife conservation.

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201 Wildlife (Conservation and Management) Act, Cap 376.

The Kenya Wildlife Service (KWS) is established under Section 3 of the Act. One of their functions under Section 3A is to formulate policies regarding the conservation, management and utilization of all types of fauna (excludes domestic animals) and flora. The service is managed by a Board of Trustees created under Section 3B(1) of the Act, one of whom is the Director of Forests.

The Kenya Wildlife Service Fund is created under Section 5A of the Act, which is managed by the Board of Trustees. Under Section 6(1) of the Act, the Minister (after consultations with the competent authority) may declare any area of land to be a national park. Section 7(1) allows a minister (after consultations) to declare that any National Park, National Reserve, Local Sanctuary or a specified part thereof ceases to be a National Park, National Reserve or Local Sanctuary.

The following provisions of the Act are noteworthy:

- Sections 18-20: governance of wildlife-related matters to be largely devolved to a Country level via the formation of County Wildlife Conservation & Compensation Committees;

- Sections 4(d) and 70: defines wildlife conservancies, and recognises wildlife conservation and management as a form of land-use that has equal status as other land-use types (such as agriculture);

- Sections 73–76: create guiding provisions for access, incentives and benefit sharing;

- Section 65–69: Conservation easements can be formed via a legally recognised agreement between the land-owner and another party. Pending the finalisation of the Community Land Bill, legally recognised easements cannot be applied on community land.

2.2.2.7  Protected Areas Act 1980/Revised 2012

The Act defines a protected area as any area, place or premises which is necessary or expedient in the interests of public safety and public order that special precautions should be taken to prevent the entry of unauthorized persons, and no person is allowed to be in that area without the permission of the prescribed authority. It is contained in Chapter 204 of the Laws of Kenya.

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204 Section 3 Protected Areas Act (Cap 204).
Any person who is in a protected area without permission commits an offence and would be liable upon conviction to imprisonment for a term not exceeding two years or to a fine not exceeding five thousand shillings, or to both imprisonment and a fine.  

2.2.2.8 Water Act 2003

The management of water was previously under the Ministry of Water and Irrigation, but is now managed under the Ministry of Environment, Water and Natural Resources. The act provides for the management, conservation, use and control of water resources. An important yet controversial area in the act is the licensing of water services. The act further establishes the Water Resources Management Authority, providing the authority with powers to develop principles, guidelines and procedures for the allocation of water resources, and to protect and manage water catchment areas. The act supports the user-pay principle as proposed in the Forests Act. Kenya Forest Service can therefore work with water user groups (consumers), service providers, and water service boards to conserve catchment forests.

2.2.2.9 Mining Act 1987/revised 2012

In Kenya, mining is governed by the Mining Act (Cap.306). Section 3 of the Act excludes mineral oils from the provisions of the Act. Under the Act, all unextracted minerals (other than common minerals) under or upon any land are vested in the Government, subject to any rights which, by or under the Act or any other written law, have been or are granted, or recognized as being vested, in any other person.

It should be noted that a new Mining Bill is currently being discussed.

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205 Section 9 Protected Areas Act (Cap 204).
207 Following cabinet restructuring after the change of President in 2013.
208 Water Act 2003, Section 7, 8.
209 This principle is based on payment of water services, based on who consumes the water and the amount that is consumed.
210 Section 4.
211 The Mining Bill’s date of origination is 17 March 2014. The first reading of the bill in the National Assembly was on 22 April 2014. Amendments to the Bill were proposed.
2.2.2.10  Agriculture laws

2.2.2.10a  Agriculture, Fisheries and Food Authority Act 2013

The Agriculture, Fisheries and Food Authority Act repealed the Agriculture Act Chapter 318. This new act provides guidelines for the promotion of soil and water conservation. It further gives policy guidelines on the development, preservation and utilization of agricultural land. 212 This act also provides for consultation with farmers when it comes to major decisions or matters that could affect their access to and/or use of land within the agricultural sector.

2.2.2.10b  The Crops Act 2013

The Act provides for the management and administration of agricultural land at national and county level in order to accelerate the growth and development of agriculture, enhance productivity and incomes of farmers and increase exports. Section 6 of the Act provides for the roles of national and county governments in the development of crops. Section 9(1) creates a commodities fund to be used to provide sustainable affordable credit and advances to farmers for farm improvement, operation and any other approved purpose.

Section 11 (1) of the Act gives authority to the Cabinet Secretary (with the advice of the Agriculture, Fisheries and Food Authority established under the Agriculture, Fisheries and Food Authority Act No. 13 of 2013) to develop rules for identifying agricultural land suitable for the production of the scheduled crops contained in the First Schedule of the Act.

2.2.2.10c  Kenya Agricultural and Livestock Research Act 2013

The Kenya Agricultural and Livestock Research Act 2013 provides for the establishment and functions of the Kenya Agricultural and Livestock Research Organisation. The purpose of the organization is to streamline, coordinate and regulate research in crops, livestock, marine and fisheries, genetic resources and biotechnology in Kenya; promote, streamline coordinate and regulate research in crops and animal diseases; and expedite equitable access to research information, resources and technology and promote the application of research findings and technology in the field of agriculture. 213

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212  Agriculture Fisheries and Food Authority Act, Act No 13 of 2013, Sections 21 and 22.

213  See section 5 of the Kenya Agricultural and Livestock Research Act.
The management of the organization is in a board.\textsuperscript{214} To ensure effective coordination of agricultural research and development activities in Kenya by organizations and individuals carrying out agricultural research, the board is mandated by Section 27 (1) of the Act to establish operational units within the secretariat in various sectors such as natural resource management.

2.2.2.11 National Museums and Heritage Act 2006

Under section 4 of the National Museums and Heritage Act, national museums shall serve as repositories for things that are of scientific, cultural, technological and human interest. The management and operations of national museums are overseen by a board of directors.

Under this act, certain elements of the environment including vegetation may be declared as objects requiring protection and application of these rules. Under section 25(1)(f), a geopark may be declared as a protected area falling under this act.

2.2.2.12 Energy Act 2006 and subsidiary legislation

2.2.2.12a Energy Act 2006

The Energy Act 2006 forms the regulatory framework for energy in Kenya. The act establishes the main body that is responsible for energy regulation, the Energy Regulatory Commission. The act also creates functions and powers for the Minister in charge of energy to promote the development and use of renewable energy technologies, including but not limited to biomass, biodiesel, bioethanol, charcoal, fuel, wood, solar, wind, tidal waves, and municipal waste.\textsuperscript{215} The Minister is also empowered by the act to establish a national energy strategy and to enact regulations.

2.2.2.12b The Energy (Energy Management) Regulations 2012\textsuperscript{216}

The Energy (Energy Management) Regulations 2012 were enacted under the Energy Act 2006 to manage the auditing of energy reduction for purposes of carbon finance. In this pursuit, the

\textsuperscript{214} Section 6 of the Kenya Agricultural and Livestock Research Act provides for membership to the board. The functions of the board are contained in Section 9 of the Act.

\textsuperscript{215} The Energy Act, Act no. 12 of 2006, Section 103(1).

\textsuperscript{216} Legal Notice Number 102 of 2012.
regulations define terms of carbon finance,\textsuperscript{217} energy auditing\textsuperscript{218} and clean development mechanisms,\textsuperscript{219} among others.

In accordance with the Kyoto Protocol to the United Nations Framework Convention on Climate Change (UNFCCC) to which Kenya is a party, these regulations are also intended to promote energy efficiency among owners or occupiers of industrial, commercial, and institutional facilities.

2.2.2.12c The Energy (Solar Photovoltaic Systems) Regulations 2012\textsuperscript{220}

The Energy (Solar Photovoltaic Systems) Regulations 2012 were established under the Energy Act 2006. The main goal of these regulations is to regulate the photovoltaic (PV) system manufacturers, importers, vendors, technicians, contractors, and system owners. The act provides for the conditions for licensing for one to qualify to be PV system manufacturer or technician. The regulations also provide for inspection by the Energy Regulatory Commission established under the Energy Act.

2.2.2.12d The Energy (Solar Water Heating) Regulations 2012\textsuperscript{221}

Enacted pursuant to the Energy Act 2006, Energy (Solar Water Heating) Regulations 2012 are established to increase usage of solar water heating and reduce reliance on electrical sources. The regulations create mandatory obligations for use of installations of hot water heaters and create a punishable offence for those who do not install solar water heating appliances at the expiration of the grace period of 5 years after the establishment of these regulations. The regulations also define key terms such as carbon finance and clean development mechanisms.

\textsuperscript{217} The Energy (Energy Management) Regulations 2012, Section 2: ‘Carbon finance means a mechanism that facilitates the financial reward through carbon credits for the reduction of greenhouse gas emissions by emitters in developing countries.’

\textsuperscript{218} The Energy (Energy Management) Regulations 2012, Section 2: ‘Energy Audit means an inspection, survey and analysis of energy flows for energy conservation in a building, process, or system to reduce the amount of energy input into the system without negatively affecting the output.’

\textsuperscript{219} The Energy (Energy Management) Regulations 2012, Section 2: ‘Clean development mechanism means a mechanism that allows emission-reduction projects in developing countries to earn certified emission reduction (CER) credits, each equivalent to one tonne of CO2, which can be traded and sold, and used by industrialized countries to meet a part of their emission reduction targets under the Kyoto Protocol.’

\textsuperscript{220} Legal Notice Number 103 of 2012.

\textsuperscript{221} Legal Notice Number 43 of 2012.
Drafted pursuant to the Energy Act 2006, the proposed Energy (Improved Biomass Cook stoves) Regulations, 2013 (currently in draft form) are intended to regulate licensing, manufacturing, distribution, inspection of improved biomass cook stoves, as well as offences and penalties. There are currently a number of local companies that have been conducting useful sustainable development activities using such cook stoves, and it is hoped that the regulations could support such enterprises.

### Key environmental governance institutions

#### Ministry of Environment, Water and Natural Resources

The Ministry of Environment, Water and Natural Resources was created after the 2013 General Election by a government restructuring process that culminated in merging the Ministry of Environment and Natural resources, Ministry of Water and irrigation, and Ministry of Forestry and Wildlife, all into the Ministry of Environment, Water and Natural Resources. The restructuring of the ministries now will see almost all functions that were carried out in the previous ministries merged into what will now be the Ministry of Environment, Water and Natural resources.

#### Kenya Wildlife Service (KWS)

The Kenya Wildlife Service (KWS) is the key government institution tasked with the management of wildlife. This body is established under the Wildlife (Conservation and Management) Act 2013. The KWS becomes important as far as the environment is concerned due to indications that the conservation of wildlife also includes flora (vegetation). The areas that are managed by the KWS are also home to many indigenous forests and general vegetation cover. The management areas of the KWS include national parks, wildlife conservation areas and sanctuaries.

#### Kenya Forest Service (KFS)

The Kenya Forest Service (KFS) is established by section 4 of the Forests Act 2005, whose functions include the formulation of policies relating to forests, the management of forests in Kenya, creation of research partnerships, and the enforcement of the forest related rules. The management of the KFS is

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223 An example of this is a company called Climate Pal - further information available at www.climatepal.com.
through a board that has the powers to approve and ratify policies\textsuperscript{224}. The board is also the organ in charge of receiving funds on behalf of the KFS\textsuperscript{225}. The rest of the management of this body is carried out through the appointed officers who work under the Director of the board\textsuperscript{226}.

\subsection*{2.3.4 Kenya Forestry Research Institute (KEFRI)}

The Kenya Forestry Research Institute (KEFRI) was established in 1986 under the \textit{Science and Technology Act} (Chapter 250). The \textit{Science and Technology Act} has since been repealed by the \textit{Science, Technology and Innovation Act}\textsuperscript{227}. KEFRI was established to carry out research in forestry and allied natural resources\textsuperscript{228}. Among the key achievements of KEFRI was the provision of guidelines in community participation in forest management\textsuperscript{229}. This institute receives financial support mainly from the government of Kenya. Its partners include the KFS, universities and other State and non-State institutions. The management of KEFRI is made possible through a Board of Management, which is headed by a director and supported by various other departments including advisory committees\textsuperscript{230}.

\subsection*{2.3.5 National Museums of Kenya}

National museums are established under the \textit{National Museums and Heritage Act}. Under section 4 of the \textit{National Museums and Heritage Act}, national museums serve as repositories for things that are of scientific, cultural, technological, and human interest. The management and operations of national museums are overseen by a board of directors.

Under the \textit{National Museums and Heritage Act}, certain elements of the environment, including vegetation, may be declared as objects requiring protection. For example, under section 25(1)(f), a geopark\textsuperscript{231} may be declared as a protected area under the act.

\begin{itemize}
  \item \textsuperscript{224} Forests Act, 2005, Section 5(a).
  \item \textsuperscript{225} Forests Act, 2005, Section 8(1)(a).
  \item \textsuperscript{226} Forests Act, 2005, Section 8(2).
  \item \textsuperscript{227} Science, Technology and Innovation Act, Act No. 28 of 2013.
  \item \textsuperscript{228} See \url{www.kefri.org}, last accessed on 27\textsuperscript{th} August 2013.
  \item \textsuperscript{229} See KEFRI, Strategic Plan 2008-2012.
  \item \textsuperscript{230} Kenya Forestry Research Institute, Enterprise Profile, Available at \url{www.kefri.org}, last accessed on 27\textsuperscript{th} August 2013.
  \item \textsuperscript{231} Although the Act does not define a geopark, some of the areas referred to as geoparks in the Kenyan lexicon seem to be areas which are carved out in a unique geographical manner, and which are also tourist attractions.
\end{itemize}
2.3.6 **Institutions under the National Environmental Management and Coordination Act**

2.3.6.1 **The National Environmental Council (NEC)**

The National Environmental Council (NEC) is created under section 4(1) of the Environmental Management and Coordination Act (EMCA). The following is the mandate of the NEC:

- NEC is responsible for formulating policies and giving directions on the implementation of the Act;
- It sets national goals and objectives that are to be fulfilled by other institutions in the bid to protect and preserve the environment; and
- It brings together the public sector and the private sector and promotes cooperation between them in the environment management programs.

The NEC is chaired by the Minister in charge of the environment – currently housed within the Ministry of Environment and Natural Resources. The secretary of NEC is the Director General of the National Environment Management Authority.

2.3.6.2 **The National Environment Management Authority (NEMA)**

The National Environment Management Authority (NEMA) is established under section 7 of the Environmental Management and Coordination Act. NEMA acts as the implementing organ for the coordination of the various activities that are proposed by the lead agencies. Some of the roles that are assigned to NEMA as an implementing organ include the creation of environmental management policies, the monitoring of natural resources in Kenya, the establishment and the review of land use guidelines, and research on environmental issues\(^2\). NEMA is also charged with initiating programs that will reduce environmental degradation\(^3\).

2.3.6.3 **Provincial and District Environment Management Committees.**

These committees are established under section 29(1) of EMCA. The section provides that the Minister responsible for environment is to appoint these committees through a gazette notice.

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\(^2\) Environmental Management and Coordination Act (EMCA), Section 9(2)(c).

\(^3\) Ibid, Section 9(2)(k).
Just as the names indicate, the committees were to carry out their work at the provincial and district levels. This decentralizes major activities of environmental management and brings them to the local government. The following is the mandate for the Committees:

- Provide assistance in to NEMA in the preparation of annual program estimates;
- Build capacity in NEMA at the two levels;
- Engage in coordinating activities with other government and non-government organizations which deal with environment conservation issues;
- Carry out surveillance of gazetted forest;
- Protect water catchment areas in those under their administration;
- Campaign for agro-forestry in order to ease pressure on government forests;
- Spearhead reduction and prevention of water pollution;
- Promotion of modern water harvesting techniques especially in arid and semi arid areas;
- Promote better farming methods to reduce soil erosion and degradation;
- Create environmental awareness through training and public meetings;
- Promote afforestation; and
- Ensure environmental impact assessment of new industries.

2.3.6.4 Public Complaints Committee (PCC)

The Public Complaints Committee (PCC) is established under section 31 of the Environmental Management and Coordination Act. The PCC is charged with the duty of investigating complaints relating to environmental damage and degradation. Upon investigation, this committee files its reports to NEC.

2.3.6.5 Standards and Enforcement Review Committee (SERC)

The Standards and Enforcement Review Committee (SERC) is a committee of NEMA and is established under section 70 of the Environmental Management and Coordination Act. This committee is responsible for the formulation of environmental standards, methods of analysis, inspection, monitoring, and technical advice on necessary mitigation measures.

2.3.6.6 National Environmental Tribunal (NET)

The National Environmental Tribunal (NET) is established under section 125 of the Environmental Management and Coordination Act. This tribunal is created to hear appeals arising from administrative decisions from the relevant organs charged with the duty of enforcement of
environmental standards. It also receives points of environmental issues for clarification from NEMA. However, this body has no power to enforce its recommendations.

2.3.6.7  National Environment Action Plan Committee (NEAP)

The National Environment Action Plan (NEAP) Committee is established under section 37 of the Environmental Management and Coordination Act. The NEAP Committee is charged with developing five year national environmental action plans, taking into consideration the value and status of natural resources in the country. The Committee, to a large extent, forms a policy-making body for the country since the action plan that it adopts becomes binding upon all organs of government. Provincial and district environmental committees are also required to develop their own five year environmental action plans, which are incorporated in the NEAP.

2.3.7  Environment and Land Court

Please see above at 2.1.5.2

A designated forest sanctuary in Nairobi.