FINAL LEGAL REPORT

FOREST GOVERNANCE, REDD+ AND SUSTAINABLE DEVELOPMENT IN KENYA

MINISTRY OF ENVIRONMENT, WATER AND NATURAL RESOURCES
REPUBLIC OF KENYA

SEPTEMBER 2013

ANNEX I
EXECUTIVE SUMMARY

This synthesis report identifies and analyzes the challenges and opportunities for REDD+ law reform and implementation in Kenya. It also gives recommendations for strengthening Kenya’s legal framework relevant to REDD+.

Laws and institutions provide an overall enabling framework that guides public and private sector activities toward desired ends. Effective legal and institutional framework can thus enhance implementation of REDD+ by eliminating challenges to REDD+ activities and promoting social and environmental benefits. The analysis in this report is founded mainly on the Cancun Agreements reached at the 16th Conference of the Parties to the United Nations Framework Convention on Climate Change, and which provides the basic framework for REDD+ activities, guidance and safeguards.

The report underscores the cross-sectoral nature of REDD+. Although forests are the primary factor, REDD+ cut across a wide range of issues including land tenure, land use planning, protected areas, and trade. They involve the range of sectoral laws concerned with the drivers of deforestation and forest degradation including energy, water and agriculture. These laws affect issues such as carbon ownership and use, the risk of reversals and displacements, participatory decision-making, benefit sharing, and incentives to relieve forests of services that can be substituted with low-emission alternatives.

The review of laws, policies and institutions in those sectors suggests that there are a number of challenges that may hinder Kenya’s implementation of REDD+. The key challenges are, inter alia:

- lack of a specific policy goal or national strategy for REDD+ readiness process and implementation. This is coupled with lack of a National Environment Policy to guide the management of the environmental resources.

- insecurity and unreliability of tenure especially in relation to Community Land where most of the REDD+ activities are expected to be conducted. Although the Constitution requires the Community land bill to be enacted to address the issue, that requirement is yet to be materialized.

- lack of clarity and coherence on some forest related laws, including the criteria for defining “communities” in relation to ownership of community
land, and the disconnect between the tenure regimes under the Forest Act and under the Constitution.

- Institutional challenges including lack of mutual supportiveness and cooperation among forest related institutions. This is expected to heighten with the entry of devolved government structure. Forest institutions are also affected by lack of adequate resources and insufficient funding.

- lack of an agreed formula for owning carbon rights and sharing REDD+ benefits.

The report gives a number of recommendations to support REDD+ implementation success in Kenya. They include:

- Inclusion of specific provisions on REDD+ in the relevant laws and policies starting with the ones that are currently under review.

- Clarifying the roles and mandates of all the forest sector institutions in order to avoid overlaps and incoherence.

- Crafting the rules for access and use rights and for carbon rights benefit sharing.

- Defining a Kenyan Criteria and Indicators (C&I) for sustainable forest management.

- Finalizing legislation on Community Land. The legislation should *inter alia*, define “community” and “community land” in a way that promotes both sustainable utilization of forests and inter-ethnic cohesion.
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<tr>
<th>Abbreviation</th>
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<tbody>
<tr>
<td>ATIA</td>
<td>African Trade Insurance Agency</td>
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<tr>
<td>BRT</td>
<td>Bus Rapid Transit System</td>
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<td>CAJ</td>
<td>Commission on Administrative of Justice</td>
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<td>CBD</td>
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<td>CCS</td>
<td>Climate Change Secretariat</td>
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<td>CDM</td>
<td>Clean Development Mechanism</td>
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<tr>
<td>CER</td>
<td>Certified Emission Reduction</td>
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<td>CFA</td>
<td>Community Forest Association</td>
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<td>DDC</td>
<td>District Development Committee</td>
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<td>DEC</td>
<td>District Environment Committee</td>
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<td>DEO</td>
<td>District Environment Officer</td>
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<td>DRSRS</td>
<td>Department of Resource Surveys and Remote Sensing</td>
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<td>EACC</td>
<td>Ethics and Anti-Corruption Commission</td>
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<td>EIA</td>
<td>Environmental Impact Assessment</td>
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<td>EMCA</td>
<td>Environment Management and Coordination Act</td>
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<td>ERS</td>
<td>Economic Recovery Strategy for Employment and Wealth Creation</td>
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<td>FCC</td>
<td>Forest Conservation Committees</td>
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<td>FCPF</td>
<td>Forest Carbon Partnership Facility</td>
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<td>FD</td>
<td>Forest Department</td>
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<td>GDP</td>
<td>Gross Domestic Product</td>
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<td>GHG</td>
<td>Green house Gas</td>
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<td>ICT</td>
<td>Information and Communication Technology</td>
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<tr>
<td>ILEG</td>
<td>Institute for Law and Environmental Governance</td>
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<tr>
<td>IMCE</td>
<td>Inter-Ministerial Committee on the Environment</td>
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<td>IPR</td>
<td>Institute of Primate Research</td>
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<tr>
<td>IUCN</td>
<td>International Union of Conservation of Nature</td>
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<td>KAM</td>
<td>Kenya Association of Manufacturers</td>
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<td>KEFRI</td>
<td>Kenya Forestry Research Institute</td>
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<td>KEPSA</td>
<td>Kenya Private Sector Alliance</td>
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KFS - Kenya Forest Service
KFWG - Kenya Forest Working Group
KNBS - Kenya National Bureau of Statistics
KVDA - Kerio Valley Development Authority
KWS - Kenya Wildlife Service
LNC - Local Native Councils
MDGs - Millennium Development Goals
MEMR - Ministry of Environment and Mineral Resources
MIGA - Multilateral Investment Guarantee Agency
MoU - Memorandum of Understanding
MSF - Ministerial Stakeholder Forums
NACOFA - National Association of Community Forest Associations
NARC - National Rainbow Coalition
NBA - National Business Agenda
NBSAP - Kenya National Biodiversity Strategy and Action Plan
NCCRS - National Climate Change Response Strategy
NEAP - National Environment Action Plan
NEC - National Environment Council
NEMA - National Environmental Management Authority
NES - National Environment Secretariat
NESC - National Economic and Social Council
NGO - Non Governmental Organization
NLC - National Land Commission
NLP - National Land Policy
NPDs - National Program Documents
NRCO - National REDD+ Coordination Office
NRSC - Inter-Sectoral National REDD+ Steering Committee
ODA - Official Development Assistance
PDCs - Parliamentary Departmental Committees
PES - Payment for Environmental Services
PMRT - Prime Minister’s Round Table
PPCSCA - Permanent Presidential Commission on Soil Conservation and
Afforestation

PPSWF - Presidential Private Sector Working Forum

PROFOR - Program on Forests of the Food and Agriculture Organization of the United Nations

PSDS - Private Sector Development Strategy

REDD - Reducing Emissions from Deforestation and Forest Degradation

REDD+ - Reducing Emissions from Deforestation and Forest Degradation, in order to foster conservation, sustainable management of forests, and enhancement of forest carbon stocks

RISSEA - Research Institute of Swahili Studies of Eastern Africa

R-PP - REDD+ Readiness Preparation Proposal

SEEA - System of Integrated Environmental and Economic Account

SNA - System of National Accounts

SPRT - Speaker’s Round Table

TARDA - Tana & Athi River Development Authority

TVET - Technical Vocational Education and Training

TWG - Technical Working Group

UNCCD - United Nations Convention to Combat Desertification

UNCED - United Nations Conference on Environment and Development

UNDP - United Nations Development Programme

UNEP - United Nations Environment Programme

UNFCCC - United Nations Framework Convention on Climate Change

UN-REDD - United Nations initiative on Reducing Emissions from Deforestation and forest Degradation

VCM - Voluntary Carbon Markets

WARMA - Water Resources Management Authority

WRUAs - Water Resource Users Associations

WWF - World Wildlife Fund
1.0 INTRODUCTION

The Cancun Agreements reached at the sixteenth Conference of the Parties (COP 16)\(^1\) to UNFCCC set the stage for a nationally-driven phased approach to efforts to reduce emissions from deforestation and forest degradation, and foster conservation, sustainable management of forests, and enhancement of forest carbon stocks – now called REDD+. In Kenya, REDD+ is already translating into real actions on the ground. Considerable policy-making and programming activities aimed at harnessing the potential benefits of REDD+ for sustainable development and appropriate response to the challenge of global warming are also being undertaken. In relation to policy making and programming, the two main international initiatives supporting developing country efforts to prepare and implement their national REDD+ strategies – the UN-REDD Programme\(^2\) and the Forest Carbon Partnership Facility (FCPF) – are actively involved.

While early discussions on REDD+ focused on policy frameworks and positive incentives, increasing attention is now being placed on the design of legal frameworks supporting in-country REDD+ implementation. The issues to be addressed through REDD+ legislation are diverse and complex. Successful REDD+ implementation will require harmonized and updated legal frameworks to contribute in generating economic, environmental and social benefits. In addition, REDD+ implementation will need to be supported by broader sustainable development strategies and participatory processes at the national level. Consistent legal frameworks are crucial tools to integrate REDD+ within national development priorities and policies. Such frameworks must necessarily address economic, environmental and social issues related to REDD+ in a

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\(^1\)UNFCCC, Report of the Conference of the Parties on its sixteenth session, held in Cancun from 29 November to 10 December 2010. Decisions adopted by the Conference of the Parties, FCCC/CP/2010/7/Add.1

\(^2\) The UN-REDD Programme is the United Nations collaborative initiative on Reducing Emissions from Deforestation and forest Degradation (REDD+) in developing countries. The Programme was launched in 2008 and builds on the convening role and technical expertise of FAO, UNEP and UNDP.
coherent way, in line with human rights principles and international environmental treaties and conventions (e.g. UNFCCC, CBD, and UNCCD).

Indeed, Kenya’s REDD+ Readiness Preparation Proposal (R-PP) recognizes that development of effective governance approaches for REDD+ will be realized by ensuring that the readiness process incorporates a strong legal framework that promotes investments while ensuring clear definitions of carbon rights and effective REDD+ benefit sharing arrangements. Well-defined land and property rights would also enable public or private payment for environmental services (PES) services.

With particular reference to REDD+, this paper examines the legal, policy and institutional frameworks related to forest governance in Kenya. The next section, two, examines the linkage between forest governance and sustainable development in Kenya. Section three analyzes land tenure laws and its relationship to forest management. This is followed by the review of the legal and policy frameworks in sections four and five, respectively. Section six presents a brief analysis of some of the emerging legal issues related to REDD+ in Kenya. The last section, eight, concludes the paper.

2.0 FOREST GOVERNANCE AND SUSTAINABLE DEVELOPMENT IN KENYA

Kenya’s forests cover a total area 3.456 million ha equivalent to 5.9% of land area. Out of this, 1.406 million ha or 2.4% of total land area comprises of indigenous closed canopy forests, mangroves and plantations in both public and private

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3 Human rights are rights inherent to all human beings, whatever our nationality, place of residence, sex, national or ethnic origin, colour, religion, language, or any other status. We are all equally entitled to our human rights without discrimination. These rights are all interrelated, interdependent and indivisible. Universal human rights are often expressed and guaranteed by law, in the forms of treaties, customary international law, general principles and other sources of international law. International human rights law lays down obligations of Governments to act in certain ways or to refrain from certain acts, in order to promote and protect human rights and fundamental freedoms of individuals or groups (OHCHR).

4 It is important to note that Article 2(5) of Kenya’s Constitution decrees that “[T]he general rules of international law shall form part of the law of Kenya”, and Article 2(6) provides that “Any treaty or convention ratified by Kenya shall form part of the law of Kenya....”
lands.\textsuperscript{5} Ranked high as an important national asset, forests have significant economic, environmental, social and cultural values. It is estimated that the forestry sector contributes approximately 1\% in monetary terms to Kenya’s Gross Domestic Product (GDP) and 13\% of the non-monetary terms.\textsuperscript{6}

Effective governance of the forest sector remains one of the country’s greatest challenges. The colonial administration set up the Forest Department headed by the Chief Conservator of Forests to superintend matters affecting the forest sector in 1942. The next half a century saw massive reduction in the country’s forest cover from 60\% to just about 2\% in the 1990s due to several factors including increased population, land use changes, inappropriate legal frameworks, and corruption, among others. The issue of corruption is worth giving further attention. In Transparency International’s Corruption Perceptions Index for 2012, Kenya is ranked 139th out of 176 countries. The forestry sector has not been spared from poor governance from the past and still faces considerable challenges presently. Poor forest governance has ripple effects and often is a reflection of the overall weaknesses in environmental governance within a country as outlined below.

2.1 Historical Antecedents

The evolution and operation of the formal environmental management system in Kenya can be better understood if we take into account the era of colonialism. From the time the British colonized Kenya in 1895, the main politico-economic agenda was to expand imperialism by maximizing the exploitation of natural resources. A legal and policy framework was developed to perpetuate a system focused on allocation, exploitation, appropriation and expropriation of natural resources. Conservation was conceived to protect selected natural resources (for example wildlife species, forests, top soil in vulnerable landscapes, etc) from human activity. The consequence was a “command and control” regime of sectoral laws, policies and institutions on agriculture, forests and water resources, among


others. Several Departments were created to oversee the implementation of these laws and policies. The Forests Department was established in 1942 under the Forest Act valid until 2005, when the current Forest Act was enacted.

The East Africa (Lands) Order-in-Council of 1901 and the Crown Land Ordinance of 1902 placed control over the more productive land and resources under the authority of the British Government, paving way for wide-scale alienation of such lands and the settlement of European immigrants. The official attitude of the colonial administration towards the existing traditional institutions was largely ambivalent. The legislature and the judiciary assisted the administration by facilitating the allocation and exploitation of the natural resources to the settlers.

Several colonial institutions with environmental functions were established during the colonial period. The colonial office encouraged the society to set aside the American-type large tracts of land for wildlife conservation and use the money raised from hunting licenses for game preservation (Kameri-Mbote 2002). This was the beginning of the protected areas system that dominates Kenya’s conservation approach until today. Conservation challenges led the colonial government to promulgate conservation policies and create environmental institutions (MacKenzie 1988; Steinhart, E. 1994; Steinhart 1989). In 1945, the Royal National Parks Ordinance was promulgated aiming to strengthen conservation initiatives. The Ordinance vested the Governor with the power, subject to the consent of the legislative council, to declare any area of land a national park through gazettement.

The colonial administration encouraged the state and private property rights systems, not perceiving any added-value in the indigenous systems. Accordingly, there was virtually no consultation in the creation of these wildlife protected areas, and concerns raised by local communities were not taken into account.

\[\text{No. 7 of 2005.}\]

Communal wildlife and forest resources were formally made state property, managed by forest and wildlife departments without considering prior rights of the natives over these resources. This explains in part the mains issues characterizing the management of natural resources in Kenya today.

2.2 Post-Independence Environmental Governance

At independence, the new administration largely inherited the colonial environmental system. From very early time of the independence period, the Sessional Paper No. 10 of 1965 on *African Socialism and Application to Planning in Kenya* (Republic of Kenya 1965) registered the Government’s interest in conserving natural resources. This interest was demonstrated by the enthusiasm by which Kenya prepared for the United Nations Conference on the Human Environment, held in Stockholm in June 1972. Through a Cabinet decision made on 8 December 1971, the Government established a small secretariat – the National Environment Secretariat (NES) – in the Ministry of Natural Resources to oversee preparations for the event.9

Following the Stockholm Conference, NES was elevated and transferred to the Office of the President. However, in 1980, it was again relocated to a newly created Ministry of Environment and Natural Resources where it remained for the next two decades as a technical Department headed by a Director. The Secretariat maintained a small staff and the resources were not enough to coordinate and effectively manage the diverse environmental challenges faced by Kenya.

Development planning was conducted through periodic 5-year development plans. Notable among these, the 1979-1983 Development Plan brought important institutional developments. For example, it led to the establishment of the Long-Range Planning Unit in the Ministry of Planning and National Development. The

9The preparations were so thorough that the Kenyan Conference delegation managed to persuade the global community to locate the United Nations Environment Programme in Nairobi Okidi, C. O. and Kameri-Mbote, P., 2001.*The Making of a Framework Environmental Law in Kenya*. ACTS Press, Nairobi
Unit’s role was to promote the integration of environmental conservation and sustainable utilization into development policy planning. A comparable effort was seen in the creation of the Inter-Ministerial Committee on the Environment (IMCE) in 1981. Convened by the Director of NES, the IMCE comprised the Ministries of Health, Industry, Water, Agriculture, Energy, Regional Development, and the Tana and Athi Rivers Development Authority. The initiative provided a multi-sectoral high-level forum for discussing environmental issues such as environmental impact appraisal of proposed projects. Although interest in the forum waned over years the Committee remained an important consultative forum for non-contentious issues during the life of NES.

In response to the ever-growing challenges of deforestation and loss of vegetation cover, the Government through a 1981 presidential administrative directive created the Permanent Presidential Commission on Soil Conservation and Afforestation (PPCSCA). PPCSCA was to focus on ways and means of conserving soil and water catchments. In addition, it was required to review the existing legislation relating to soil conservation, afforestation, and flood control with a view to recommending an effective course of action. Like in the colonial period, the provincial administration retained considerable environmental management powers in post-independence Kenya. It is through the provincial administration that the ad hoc environmental conservation initiatives – like planting trees and building gabions and terraces – of the PPCSCA were carried out. This role was later to be consolidated in 1988 through the Government’s policy of district focus for rural development, which sought to decentralize policy implementation to the districts, thereby giving the district commissioners, officers and chiefs considerable environmental management responsibilities.

Under the initiative, an inter-sectoral policy decision-making authority called the District Development Committee (DDC) chaired by the District Commissioner was established in each district. The Government also established the positions of District Environment Officer (DEO) for each administrative district. The DEO was responsible for supervising and coordinating all environmental matters at the district level. It is worth noting that the DEOs worked in the Office of the
President while NES was located in the Ministry of Environment and Natural Resources.

In addition to the institutions described above, one must add the vast range of sectoral institutions and agencies with environmental functions set up under various ministries, such as the Fisheries Department, the Forest Department (now the Kenya Forest Service), and the Department of Mines and Geology – all established in the Ministry of Environment and Natural Resources. However, the principal concern of these institutions has to a large extent been focused on the protection and exploitation rather than on the planned management of the resources for which they are responsible.

2.3 1992 Rio Summit and Sustainable Development in Kenya

While the developments described in the previous sections illustrate a long-standing search for suitable institutional arrangements to improve environmental governance in Kenya, the major developments on this front can be attributed to the UNCED process which culminated into the Earth Summit in Rio de Janeiro in June 1992. The process represented an important paradigm shift from the environmental protection of the post-Stockholm era to sustainable development as a central global agenda. It also coincided to promote democracy and constitutional reforms not just in Kenya, but across the entire African continent.

The Rio Declaration and Agenda 21 exhorted governments to establish an effective legal and regulatory framework with a view to enhancing national capacities to respond to the challenges of sustainable development. In Kenya, that period coincided not only with an increased integration of environmental concerns into development planning but also more attention to environmental law and policy formulation in Kenya. For example, while the 1984-88 Development Plan merely stressed the Government’s commitments related with environmental protection, the sixth National Development Plan for the period 1989-93 included an environmental component in different resource sectors. The National Environment Action Plan (NEAP) process, concluded in 1994,
underscored the need for a comprehensive environmental policy and law. A policy was formulated by 1996 but was not presented to Parliament for discussion. A framework environmental law was enacted in 1999 as the Environment Management and Coordination Act, referred to as EMCA.

EMCA did not remove the edifice of sectoral environmental institutions created during the colonial era and inherited at independence. Thus the current institutional framework comprises the various ministries concerned with natural resource sectors like water, agriculture and wildlife, the numerous agencies created under various laws, and a vast range of institutions established under the Environmental Management and Co-ordination Act.

2.4 Recent Constitutional and Legal Developments

Kenya’s promulgation of a new Constitution on 27 August 2010 in many ways represents a key momentum in so as addressing the country’s land and environmental governance is concerned. The Constitution, widely acclaimed as progressive and green, pays considerable attention to political and institutional matters associated with land, sound natural resource management and nature conservation. It seeks to ensure synergetic relations between the national and county level governments in the management, utilization and equitable benefit sharing of natural resources.

The Constitution highlights the need for good governance. In relation to natural resources, it seeks to move Kenya away from previous environmental management models focused on dominant state institutions planning for and managing the use of natural resources. Such models tend to be unresponsive to pertinent interests of local people, thereby compromising their legitimacy and effectiveness, as they fail to capture the crucial inputs and innovations coming from the citizens. In contrast, management approaches that involve local communities and recognize local behaviors and patterns of resource use can

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utilize locally developed and controlled responses, making them more likely to be successful in solving environmental problems.

The new Constitution has several implications for forest governance and the development of an appropriate legal framework for reducing emissions from deforestation and forest degradation (REDD+). It dedicates an entire chapter, five, to land and environment. It also entrenches a wide range of social, political, economic and cultural rights. It further drastically changes the entire system of political governance by devolving authority to county governments and decreeing the need for citizen participation in decision making. It enshrines the right to information, and makes principles of international law and treaties ratified by Kenya to be part of the country’s municipal law.

3.0 LAND TENURE AND FOREST GOVERNANCE IN KENYA

3.1 Contextualizing Land Tenure

According to the United Nations, “land tenure is the relationship, whether legally or customarily defined, among people, as individuals or groups, with respect to land”\(^\text{11}\). Land property rights in most developing countries reflect a diversity of tenure regimes. This notion is often complemented by the description of the ‘bundle of rights’\(^\text{12}\) which constitutes property rights over forests and land in relation to: access rights, withdrawal rights, management rights, exclusion rights and alienation rights.

Kenya’s Constitution categorizes land as private, public or communal. Depending on the tenure regime, In relation to REDD+, land tenure rights have to be seen in close connection with forest and agriculture sectors, considering that agriculture expansion is one of the main factors of deforestation. Tenure of forests includes ownership, tenancy and other arrangements for the use or conservation of

\(^{11}\) FAO Land tenure studies, land tenure and rural development, 2002.

forests, trees, and forest resources. It is a combination of legally or customarily defined forest ownership and of rights and arrangements to manage and use forest resources such as timber, charcoal or fuel wood. Tenure defines the methods by which individuals or groups acquire, hold, transfer or transmit property rights in land.

The tenure regime adopted should also strive to satisfy various policy objectives such as:

- Efficiency in land use by providing a smooth functioning land market and permits maximum productivity of land resources for all types of uses. The system should also be responsive to various changes on demand;
- Equity by ensuring that the tenure system provides reasonable access to all groups especially those of low income or vulnerable groups;
- Compatibility with other policy instruments dealing with economic development and must not contradict existing legislation; and
- Continuity so that it avoids abrupt breaks in the existing political and cultural set up.

These objectives should be achieved whether the land is held in freehold, leasehold, customary or other interests.\(^\text{13}\)

### 3.2 Kenya’s Land Tenure Regime

There are three main tenure regimes in Kenya: Community, Public and Private

#### 3.2.1 Community Tenure

This refers to unwritten land ownership practices carried out by certain communities under customary law. Kenya being a diverse country in terms of its ethnic composition has multiple customary tenure systems, which vary mainly due to different agricultural practices, climatic conditions and cultural practices.

First, individuals or groups by virtue of their membership in some social unit of production or political community have guaranteed rights of access to land, while

\(^{13}\) Sessional Paper No. 3 of 2009 on the National Land Policy
the control over other natural resources rights are vested in the political authority of the unit or community. This control is derived from sovereignty over the area in which the relevant resources are located.

Prior to the first ever land policy\textsuperscript{14} in Kenya and the 2010 Constitution, Customary land rights were neither recognized as a legal tenure regime in Kenya nor given adequate attention in the law. Group or community ownership rights were recognized under the form of trust land and group ranches. Trust land referred to areas that were occupied by the natives during the colonial period but had not been consolidated, adjudicated or registered in individual or group names, and native land refer to lands that had not been taken over by the government. Trust lands were governed by the Trust Land Act\textsuperscript{15} and were held prior to the 2013 General Election, by local authorities or county councils. In respect of the occupation, use, control, inheritance, succession and disposal of any Trust land, the Act grants to every tribe, group, family and individual all the rights that are allocated by virtue of existing African customary law or any subsequent modifications thereof.

The Act details an elaborated procedure to be followed in case the government or the county council wants to allocate a portion of Trust land for public purposes. The procedure \textit{inter alia}, prohibited expropriation of Trust land without compensation. However, as pointed out in Kameri-Mbote \textit{et al.} (2013)\textsuperscript{16} the record shows that this procedure has routinely been disregarded. County councils in many cases disposed trust lands irregularly and illegally.\textsuperscript{17} A similar situation occurred with community or group ownership.

\textsuperscript{14}Ibid, at para 5

\textsuperscript{15}Chapter 288 Laws of Kenya


\textsuperscript{17}Supra note 19 para 65
Group tenure over land has been recognized only in exceptional cases, one being the registration of group ranches in pastoral communities. A group ranch refers to a demarcated area of rangeland, to which a group of pastoralists who graze their individually owned herds on it, have official land rights. Group ranches are governed by the Land (Group Representatives) Act. The Act, for its purposes defines a group as a “tribe, clan, family or other group of persons, whose land under recognized customary law belongs communally to the persons who are for the time being the members of the group, together with any person of whose land the group is determined to be the owner”. In many cases, the group representatives entrusted with the management of such group land disposed of group land without consulting the other members of their groups. Group ranches suffered two other setbacks. First, the group representatives lacked the authority of traditional leaders leading to questions over their legitimacy. Second, government policy has tended to emphasize individual land rights over group ownership. These factors have led to defensive subdivision and individual titling of land within group ranches to avoid encroachment by government or other entities.

The conversion of trust land and group ranches into individual or state ownership had significant implications. The land is removed from the ambit of council control for conservation and development purposes, and access by communities previously occupying the land is curtailed.

The Constitution of Kenya 2010 and the National Land Policy provide for the recognition of community rights to land. The two texts replace the traditional

18 Kameri-Mbote et al., 2013, supra note 21

19 Chapter 287 of the Laws of Kenya

20 Section 23 (2)(a)

21 Supra note 19, at para 65

22 Kameri-Mbote et al., 2013, supra note 21

23 Ibid
Government, Trust and Private tenure regimes with Public, Community and Private tenure regimes, presenting an opportunity to establish new land laws for the protection of all the three tenure regimes. The Parliament has already enacted the Land Act and the Registration of land Act to govern all private and public lands. The Constitution also requires the Parliament to enact within five years, pieces of legislation to govern Community Land. Following to this, a Community Land Bill has been drafted but has not yet been adopted by the Parliament.

The Constitution vests community land in communities identified on the basis of ethnicity, culture or similar community of interest. It states that any unregistered community land should be held in trust by county governments on behalf of the communities for which it is held. Community land comprises: land registered in the name of group representatives under the provisions of any law; land transferred to a specific community by any process of law; any other land declared to be community land by an Act of Parliament; land that is held, managed or used by specific communities as community forests, grazing areas or shrines; ancestral lands and lands traditionally occupied by hunter-gatherer communities; and land held as trust land by the county governments. The Constitution also predicates any disposition or use of community land on legislation specifying the nature and extent of the rights of members of each community individually and collectively.

The National Land Policy designates all land in Kenya as Public Land, Community Land and Private Land. The policy defines community land as “land lawfully held, managed and used by a specific community as shall be defined in

24 Article 63 (5)
25 Article 63 (1)
26 Article 63 (2)
27 Article 63 (4)
28 The National Land Policy supra note 19 p57
Community is defined as a clearly defined group of users of land, which may, be, a clan or ethnic community. These groups of users hold a set of clearly defined rights and obligations over land and land-based resources. In the National land commission Act, community is defined as a clearly defined group of users of land identified on the basis of ethnicity, culture or similar community of interest as provided under Article 63(1) of the Constitution, which holds a set of clearly defined rights and obligations over land and land-based resources. The NLP particularly identifies subsistence farmers, pastoralists, hunters and gatherers as vulnerable groups who require facilitation in securing access to land and land based resources; participation in decision making over land and land based resources; and protection of their land rights from unjust and illegal expropriation.

To secure community land, communities are encouraged to settle land disputes through recognized local community initiatives consistent with the Constitution which adhere to the constitutional imperatives of non-discrimination, participation, equity and fairness. The National Land Commission Act also mandates the National Land Commission to encourage the application of traditional dispute resolution mechanisms in land conflicts.

From the foregoing discussion, it is apparent that the Constitution and the NLP provide a framework for the recognition of community land rights. The provisions protecting customary land rights also present the following

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29The national land Policy supra note 19 p63

30See the Glossary of terms section of the National Land Policy supra note 19

31Act Number 5 of 2012

32Ibid, Section 2

33The National land Policy, supra note 19, p195-198

34The Constitution of Kenya 2010, Article 60 (1)

35Section 5(1)(f) Act Number 5 of 2012 supra note 36
challenges\textsuperscript{36}. First, the parameters for identifying communities are very general. It is not clear for example if communities can be derived from an amalgamation of all three identifiers or if the identifiers are mutually exclusive. Secondly, the provisions for community rights to land come at a time when there is heightened ethnic awareness in Kenya following the 2007/2008 post election violence. Community claims to land could therefore ignite ethnic tensions unless handled carefully.

Thirdly, community has very diverse meanings and neither the constitution nor the NLP offer sufficient guidance on which of the three criteria (ethnicity, culture and community of interest) should be applied in defining community in any specific situation. Fourth, many communities linked by culture and ethnicity and governed by African customary laws often exclude women and youth from exercising authority over property relations especially land. This presents a challenge of balancing between respecting cultural norms and practices, attaining equality and non-discrimination, and guaranteeing meaningful involvement of marginalized groups in designing community land rights regime, since all these potentially conflicting goals are contained in the 2010 constitution. Lastly, customary tenure is very resilient having survived successive official attempts on its life. Drafting a lasting community land rights regime therefore requires very careful treatment of customary practices.

\textbf{3.2.2 Private Tenure}

Private tenure refers to registered land held by any person under any freehold or leasehold tenure, or any other land declared private land under an Act of Parliament.\textsuperscript{37}\textit{Freehold tenure} confers the greatest interest in land called absolute right of ownership or possession of land for an indefinite period of time, or in perpetuity. \textit{Leasehold tenure} is an interest in land for a definite term of years and may be granted by a freeholder usually subject to the payment of a fee or rent and is subject also to certain conditions which must be observed, such as those

\textsuperscript{36}Kameri-Mbote \textit{et al.}, 2013, \textit{supra} note 21

\textsuperscript{37}Article 64 of the Constitution of Kenya 2010
relating to developments and usage. In Kenya a leasehold title can be granted for a maximum period of 99 years.

3.2.3 Public Tenure

This is where land is owned by the Government for its own purpose and which includes un-utilized or un-alienated government land reserved for future use by the Government itself or may be available to the general public for various uses. The public land includes all minerals and government forests other than those lawfully held, managed or used by specific communities. Also included as public land are government game reserves, water catchment areas, national parks, and protected areas; all roads and thoroughfares; and all rivers, lakes and other water bodies.

3.3 Relationship between Tenure and Forest Governance

The forest sector is comprised of three distinct tenure systems:

a) Public Forests – gazetted forests including national parks and national reserves;

b) Private Forests – owned by private individuals, businesses or institutions;

c) Local Authority Forests – refers to forests on land held by communities defined on basis of ethnicity, culture or similar community of interest. They include forests held in trust by County Governments on behalf of the people resident in the county.

38 Article 62 (1) of the Constitution of Kenya 2010

39 Ibid (f), (g), (h) and (i)

40 Although classified as Local authority Forests under the Forest Act 2005, the local authorities ceased to exist under the new devolved system of government. These forests are now held in trust by the county governments on behalf of people resident in the county.

41 This excludes unalienated government land, lands transferred to the State by way of sale, reversion or surrender; land in respect of which no individual or community ownership or heir can be identified by any legal process; or land lawfully held, used or occupied by a national state organ as lessee under a private lease.
Trust land forests constituted the largest forest tenure system in Kenya in 2010, encompassing approximately 58 percent of the country’s forest area. 42 Publicly owned forests were the second largest ownership system at approximately 39 percent, with privately owned forests making up the remaining share at 2.6 percent.43

Under the Forests Act, 2005, all forests in Kenya other than private and trust land 44 forests are vested in the state to be managed by the Kenya Forest Service subject to the rights of the user.45 The Minister for the time being responsible for forests may declare any unalienated government land or land purchased or acquired by the government as a state forest.46 Private forests are pegged to ownership of land while community forests management is predicated pegged on the registration of a community Forest Association under section 46 of the act. Land tenure is inextricably linked to many forest governance factors, thus it is difficult to disentangle tenure from Forest governance. Most fundamentally, the various land tenure systems are composed of many different property right bundles, and specific bundles affecting forest outcomes in different ways.

Tenure relies on, and is conditioned by, governance. Effective tenure is both impossible to achieve without supportive policy and institutional systems, and rather useless without broader institutional capacity to do something with it. For example, rights without effective sanctions against their transgression are insufficient, while institutional effort in support of wise forest management in the absence of clear forest use rights is likely to be wasted. Understanding tenure

43Ibid
44Under the new devolved system of government, the local authorities ceased to exist. The local authority forests are now classified under community forests and are held in trust by the county governments on behalf of people resident in the county.
45Forest Act (2005) section 20
46Ibid section 22
requires an understanding of the extent to which, and the ways in which, national legislation is actually applied on the ground. It also demands understanding other systems of resource tenure that may not be reflected in legislation but may enjoy legitimacy for local people. A notable example is the customary rights to land which prior to the 2010 constitution, were not recognized in law. In fact, in relation to forest tenure, there is still a disjuncture between the provisions of the Constitution and those of the Forest Act of 2005. While the Constitution provides for public, private or community forests, the Forests Act 2005 categorizes forests as State, Local authority\(^47\) or Private forests. The Forests Act 2005 is however currently under revision in order to align it with the provisions of the Constitution.

4.0  FOREST RELATED POLICIES

The concept of forest governance refers to the process of formulation, articulation, administration and implementation of policies, institutions, legislation, regulations, guidelines and norms relating to ownership, access, control, rights and responsibilities and practices for sustainable management of forests at local or national levels.\(^48\) These become the subject of comprehensive and appropriate forest policies. Failure to articulate them in a comprehensive forest policy leads to low levels of transparency, accountability, lack of equity, and public participation in decision-making, as well as weak coordination across different sectors and levels of government.

This has been the fate of forest governance in Kenya. Over the years, weak forest governance has led to massive deforestation and forest degradation. In 1963, when Kenya got its independence the forest cover stood at approximately 11

\(^47\) See supra note 25

percent.\textsuperscript{49} Due to poor forest governance, deforestation reduced Kenya’s forest cover to just about 2\% in the late 1990s, with the country losing approximately 12,000 hectares of forest a year despite the government’s attempts to alleviate the problem\textsuperscript{50}. Whereas the drivers of deforestation are diverse, the main ones in Kenya are conversion to agricultural land in response to demographic pressures; unsustainable production methods and consumption patterns for charcoal; degazetting of forest lands; ineffective institutions and enforcement; corruption; illegal logging; and unclear land tenure for forest-adjacent peoples.\textsuperscript{51}

Prior to 2007, Kenya did not have a forest policy articulated in a specific official sessional paper. A draft policy developed through the second half of the 1990s and first half of 2000’s remained the main reference point in terms of articulation of key policy issues and objectives in the forest sector. To this, one could add the sketchy two-page Forest Policy of 1968 that has since descended into obsolescence. The early 2000’s saw widespread public concern over the environmental impacts of forest loss. This resulted in revision and updating of both the forest policy and legislation in order to improve forest governance as well as to reverse the trend in forest degradation and destruction.\textsuperscript{52} Both the revised Forest Act 2005 and the Forests Policy came into force in 2007.

The dominant features of the revised policy and Act are the creation of a new institution (KFS) to replace the Forest Department, enhanced civil society participation and partnerships in forest management, new benefit sharing arrangements, and recognition of the important role of forests in livelihoods and sustainable development. Both the forests Act 2005 and Forests Policy 2007 are currently being revised again in order to align them with the new Constitution


\textsuperscript{50}Food and Agricultural Organization. 2010. p. 10.


\textsuperscript{52}Ibid
enacted in 2010. The subsidiary legislation and the operating rules and regulations required to effectively implement the Act are also in the process of being developed. Other than the Forests Policy and the Forests Act, Kenya’s forest governance can also be appreciated by examining salient issues affecting the sector as articulated in the Constitution and various sectoral legislation and policies.

4.1 **Vision 2030**

Kenya’s overall sustainable development framework is contained in its *Vision 2030*, popularly referred to as *Ruwaza ya Kenya 2030* in Swahili. Launched on 10 June 2008, it articulates the country's long-term development programme for the period between 2008 and 2030. Its stated objective is to help transform Kenya into a “middle-income country providing a high quality life to all its citizens by the year 2030.” The strategy was developed through an all-inclusive and participatory stakeholder consultative process. It is organized around three “pillars”: economic, social and political. The Vision is to be implemented in successive five-year Medium-Term Plans. The first such plan covered the period 2008–2012. Subsequent plans will be development to cover the remaining five-year periods until 2030. It is hoped that through these plans, the country will be able to meet the Millennium Development Goals (MDGs) by 2015, as well as any other future sustainable development goals.

Accordingly, Vision 2030 has become the key reference point of the country’s macro- and micro-economic development planning. The vision provides an important basis for improving environmental management including forest governance and thus is critical for the success of REDD+ implementation. It acknowledges that the country’s planned 10 percent growth rate per annum will bring changes that are likely to have adverse impacts on the environment. The changes include exploitation of natural resources such as forests, increasing pollution levels and urbanization. The vision calls for effective management in order to ensure sustainability.
Vision 2030 recognizes several challenges facing environmental management in Kenya. Among these is severe destruction and degradation of the five water towers constituting Kenya’s main forests. The other challenges that relate to REDD+ include destruction of critical wildlife habitats; environmental degradation caused by *inter alia* industrial, car and wood fuel emissions; climate change and desertification; and low capacity to harness natural resources. In order to address these challenges, it states the vision for the environmental sector as “a people living in a clean, secure and sustainable environment”. Vision 2030 details the strategic thrusts, concrete goals and flagship projects to deliver the goals. Most of the flagship projects are very closely linked to forests hence can enhance the success of REDD+. They include water catchment management entailing full rehabilitation of the five water towers, secure wildlife corridors and migratory routes; and accurate and continuous land cover and land use mapping. The flagship projects are to be achieved through initiatives such as farmland and dry land tree-planting, carbon offset schemes (e.g. REDD+), capacity for environmental and natural resource information management; and use of market-based environmental instruments.

Other sectors under the vision’s social pillar also touch on REDD+ related issues. For instance, to achieve the vision of the tourism sector, niche products will be developed to complement the coastal and safari products that the tourism sector has traditionally focused on. Among the niche products to be developed is eco-tourism and the vision specifically aims to develop eco-tourism sites in Kakamega Forest, Ruma National Park, Mt. Elgon and Mt. Kenya regions. These are basically forested areas. Their conservation and management for the eco-tourism will also have implications for the REDD+ activities. Section 4.7 deals with

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53 See Chapter 4.6 of Kenya Vision 2030

54 The five water towers are Mau Escarpment, Mt. Kenya, Aberdare Ranges, Cherangany Hills and Mt. Elgon.

55 Destruction of water catchments is also identified as a challenge and dealt with under the water and sanitation section of Vision 2030

56 REDD+ activities refer to the activities that developing country parties to the Cancun Agreements are required to undertake in order to contribute to mitigation actions in the forest sector. They are reducing
gender, youth and vulnerable groups. In order to give the youth a chance to excel in various aspects of life, the vision identifies flagship projects aimed at enhancing youth empowerment, sports and music. Other initiatives to be implemented alongside the flagship projects include encouragement of youth to participate in environmental conservation (e.g. by planting trees) to increase afforestation. If implemented well, this will clearly boost the efforts of implementing REDD+.

Government departments and agencies are required to align their sustainable development with Vision 2030. Various ministries that existed prior to the March 2013 election have already done this. For instance, the now obsolete Ministry of State for Northern Kenya and Other Arid Lands formulated Vision 2030 to “complement and deepen national Vision 2030 by explaining how its goals will be realized in the specific context of Northern Kenya and the country’s arid and semi-arid lands.” Since the ministry was abolished in April 2013 by the new government, it will be interesting to see if the vision will be supported and implemented by the county governments in Northern Kenya and other arid lands, as well as by the national government perhaps through the new Ministry of Devolution and Planning.

The Vision 2030 for Northern Kenya and Other Arid Lands acknowledges the special circumstances of previously marginalized communities, and places a premium on reducing poverty and inequality and re-balancing regional development. It thus articulates the form that investment would take in the north of Kenya and the country’s arid and semi-arid lands taking in to account the distinctive characteristics of these areas. Like its national counterpart, it is also to be operationalized through a series of five-year medium-term investment plans.

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57There was a massive restructuring of the national government structure by the new government after the March 2013 election. Several ministries were merged together in an attempt to form a lean but effective government.

The Vision deals with what is commonly called the arid and semi-arid lands (ASALs) which make up to 89% of the country. It is apparent that these are the same areas where much of the REDD+ activities will be undertaken in the near future. The dominant production system in the arid counties, and in some of the semi-arid counties, is pastoralism. They are also synonymous with the concept of ‘Northern Kenya’, or the area once known as the Northern Frontier District. They are characterized by three main issues: dryness, pastoralism, and relatively poor public service delivery – all of which have distinct but overlapping policy implications.

4.2 National Climate Change Response Strategy (NCCRS)

With the NCCRS, Kenya plans to align its REDD+ Policy, Land Policy, Draft Environment Policy, Draft Forest Policy and the Energy Policy. The NCCRS has been developed to steer Kenya onto a climate-proofed and low carbon development path, identifying the forestry sector as one of the key sectors in which to implement climate change mitigation actions.

The NCCRS recognizes that climate change is affecting and will continue to affect every facet of life of the Kenyan people. According to the strategy, adverse impacts of climate change have been observed or will potentially affect natural systems such as forests and land use; rangelands and wildlife resources; and water resources. There have also been observed or potential adverse impacts on key economic sectors including agriculture and food security, tourism, wildlife, fisheries and forest products, as well as on physical and social infrastructure including transport and communication, health, energy, settlement. The NCCRS seeks to tackle these impacts by ensuring that adaptation and mitigation measures are integrated in all government planning and development objectives.

59Ibid. Arid counties alone cover 70% - and are home to 38% of the population.


61Ibid at Chapter 2
To do this, it calls for collaborative and joint action with all stakeholders (private sector, civil society, NGOs, etc).

The NCCRS is very critical for the success of Kenya’s REDD+ implementation. First, the forest sector is indicated as among the key priority areas identified by the NCCRS for quick and immediate actions. Secondly, the NCCRS’s proposed mitigation interventions include restoring the country’s forest cover, developing renewable energy sources; implementing energy efficiency programmes; and reducing emissions from the agricultural and transport sectors. These interventions are consistent with the REDD+ activities which are reducing emissions from deforestation and from forest degradation; conservation of forest carbon stocks; and sustainable management of forests. The NCCRS also refers specifically to carbon markets, clean development mechanism (CDM) and REDD as a way of encouraging the mitigation interventions mentioned above. It details how the mitigation projects can gain monetarily from ‘carbon markets’ by selling certified emission reduction (CER) credits to developed countries or through the Voluntary Carbon Markets (VCM). The NCCRS details the measures that Kenya needs to take in order to participate and benefit from the carbon market.

Thirdly, some of the NCCRS strategic objectives also form requirements under the Cancun Agreements, to support the REDD+ activities. They include concerted action plans, monitoring and evaluation of impacts of mitigation actions; and enhancing research and technology. Fourthly, the key NCCRS

62 The other key economic sectors to be given immediate attention under the NCCRS are agriculture and food security, water, rangelands, health, social and physical infrastructure. See Ibid, at Chapter 3.2

63 Supra note 43, at Chapter 4

64 Supra note 1, at para 70

65 See Supra note 43, at Chapter 4 for a review of the proposed measures

66 Supra note 43, at chapter 3.3.3

67 Ibid, at para 73
objectives are also consistent with the REDD+ guidance and safeguards. These are inter alia, understanding the national and international climate change obligations and maximizing Kenya’s beneficial effects of the international agreements, policies and processes. Others are recommending capacity building; and enabling policy, legal and institutional frameworks.

4.3 The NCCRS Action Plan

The NCCRS gives a detailed breakdown of action plan, detailing implementing institutions of specific activities, their time frame and costs. The Plan covers a duration of 20 years, coinciding with the Vision 2030 and the initial five years coinciding with the Millennium Development Goals (MDG) fulfillment. The activities cut across various sectors including health, agriculture, forestry and wildlife, environment, tourism, regional development authorities, water and irrigation, energy, roads and transport, gender, youth and sports, education and ICT. Many of the proposed activities can support Kenya’s REDD+ process by promoting afforestation, reforestation or forest conservation.

The activities under agriculture sector include promotion of agroforestry while the marine and fisheries activities include mitigation against loss of biodiversity through among other things, mangrove restoration and planting vegetation to prevent riverine and lakeshore erosion. The sector is also required by the strategy to reduce carbon emissions by promoting use of renewable energy technologies in its activities. A draft of REDD+ relevant proposed activities are listed under the forestry and wildlife sector. It also contributes to operationalize the Forests Act 2005, as well as afforestation and reforestation programmes targeting additional 4.1 million Ha of land under forest cover. The strategy also requires the sector to enhance the conservation and management of all types of forests including industrial forest plantations, and to engage with a wide range of stakeholders for that purpose. In addition, the forest sector is requiring pursuing innovative funding mechanisms including payment for environmental services. This

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68 For the Cancun Agreements guidance and Safeguards, read Appendix I to the Cancun Agreements (Decision 1/CP.16). See Supra note 1.
requirement can effectively take advantage of the opportunities offered by REDD+. Lastly, the forest sector is expected to promote climate change research.

The environment sector is required under the strategy to coordinate sustainable environmental management. REDD+ related proposed activities in the energy sector include promotion of renewable energy technologies and water catchments protection programmes. The Regional development authorities and the Cooperatives movement are also expected to spearhead climate change response activities, some of which can enhance the success of REDD+. For instance, the Tana & Athi River Development Authority (TARDA) is required to undertake Upper Tana Catchment Afforestation and Conservation Project, while Kerio Valley Development Authority (KVDA) is required to do the same for the Cherangany Hills Watershed.

In the transport sector, proposed activities include development of a Bus Rapid Transit (BRT) System and light rail, in order to reduce GHG emissions. The NCCRS also targets the Gender, Children & Social Services e.g. by requiring climate change education and awareness programmes and support for environmental conservation groups. The NCCRS plans to take advantage of youth and sports to mount mass tree planting countrywide as employment for the youth. NCCRS also proposes climate change education and awareness to be mainstreamed in the education and ICT sectors.

## 4.4 National Land Policy

The National Land Policy (NLP) has a vision to guide the country towards a sustainable and equitable use of land. The land policy calls for immediate actions to address environmental problems that affect land such as degradation, soil erosion and pollution. For instance, the policy stipulates the principle of conservation and management of land based natural resources, the principle of protection and management of fragile and critical ecosystems including wetlands and arid lands. The policy further calls for extensive overhauls to current

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policies and institutions in an attempt to address chronic land tenure insecurity and inequity.

The National Land Policy designates all land in Kenya as public, private (freehold or leasehold tenure), or community land, which is held, managed and used by a specific community. The land policy has thus been formulated to address the critical issues of land administration, access to land, land use planning, restitution of historical injustices, environmental degradation, conflicts, unplanned proliferation of informal urban settlements, outdated legal framework, institutional framework and information management. The Land Policy is particularly important for REDD+ in Kenya, as it provides guidance on issues relating to land utilization. The land Policy principles include equitable access to land, intra- and inter- generational equity; gender equity, secure land rights; effective regulation of land development; sustainable land use; access to land information, efficient land management; and transparent and good democratic governance of land.

The policy also deals with environmental management and requires inter alia conservation and sustainable management of land based natural resources including forests, national parks and arid and semi arid lands. It also requires environmental assessment and audit on all land developments that are likely to degrade the environment. Importantly, the policy calls for cross-sectoral coordination and cooperation among related sectors such as agriculture, water, energy, human settlement, industry, tourism, wildlife and forestry. These requirements are consistent with the REDD+ activities such as sustainable forest management and addressing the drivers of deforestation and forest degradation. They are also coherent with the REDD+ safeguards such as the requirement for actions to be consistent with the objectives of national forest programmes and relevant international conventions and agreements; transparent and effective national forest governance structures; effective participation of relevant stakeholders; consistency of actions with the conservation of natural forests and

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70 Constitution of Kenya Article
biological diversity. This policy can therefore enhance the success of REDD+ if properly implanted. Already the Land Act (No. 6 of 2012) was enacted to operationalize the policy and there are also ongoing efforts to develop the rules and procedures for its full implementation.

4.5 Energy Policy

The Energy Policy has important repercussions for total national greenhouse gas emissions, particularly as Kenya depends widely on the use of fuel wood and charcoal in both rural and urban populations. Impacts of energy production and consumption include atmospheric pollution, deforestation, climate change, soil erosion and siltation of hydropower reservoirs and river systems, among others.

This policy ensures the relevant ministries and organizations address environmental problems associated with energy, and the related Act supports the promotion and development of renewable sources of energy, especially through agroforestry; and the conservation of energy through appropriate technologies.

About 5.9% of Kenya’s land area is covered by forests which produce about 45% of the biomass energy resources including wood wastes. The balance is derived from farmlands in the form of woody biomass as well as crop and animal residues. Some of the proposed actions within this policy include the promotion of the use of fast maturing trees for energy production including biofuels and the establishment of commercial woodlots including peri-urban plantations and harnessing opportunities offered under clean development mechanism and other mechanisms including, but not limited to, carbon credit trading to promote the development and exploitation of renewable energy sources. The Government has promoted Agroforestry and social forestry programmes to increase the stock of woody biomass on farms to make up for the loss of forest trees as forestland is converted into agricultural and settlement land.

It supports the development of renewable sources of energy, mainly via more sustainable agroforestry systems, as fuel wood, charcoal and biomass, which remain both a key energy source and a key driver of deforestation and degradation in Kenya. The policy recognizes the importance of, and urgency for,
energy efficiency and conservation. It outlines a raft of strategies including recognizing energy efficiency and conservation as a high-priority area and promoting initiatives in it in all sectors.

4.6 Draft Forest Policy

The Draft Sessional Paper No. 1 of 2007 on Forest Policy aims to enhance the contribution of the forest sector in the provision of economic, social and environmental goods and services. While it highlights several objectives, the two most critical ones are: (1) the enhancement of forests’ contribution to poverty reduction, employment creation and improvement of livelihoods through sustainable use, conservation and management of forests and trees; and (2) promoting participation of communities and other stakeholders in forest management and decision making. At the same time, the forest sector has been beset by conflicts between forest managers and forest adjacent communities over access to forest resources. The new Forest Policy is still in draft form; however its provisions are enacted by the Forests Act of 2005, which came into force in 2007. The specific objectives of the revised Forest Policy are to:

- Contribute to poverty reduction, employment creation and improvement of livelihoods through sustainable use, conservation and management of forests and trees
- Contribute to sustainable land use through soil, water and biodiversity conservation,
- Promote the participation of the private sector, communities and other stakeholders in forest management to conserve water catchment areas, create employment, reduce poverty and ensure the sustainability of the forest sector
- Promote farm forestry to produce timber, wood fuel and other forest products
- Promote dry-land forestry to produce wood fuel and to supply wood and non-wood forest products
- Promote forest extension to enable farmers and other forest stakeholders to benefit from forest management approaches and technologies; and
• Promote forest research, training and education to ensure a vibrant forest sector.

4.7 Draft National Environment Policy

It is another instrumental tool, which aims to promote REDD+ activities in Kenya. The revised draft of the National Environmental Policy, dated April 2012, sets out important provisions relating to the management of ecosystems and the sustainable use of natural resources, and recognizes that natural systems are under intense pressure from human activities particularly for critical ecosystems including forests, grasslands and arid and semi-arid lands. The objectives of the Policy include developing an integrated approach to environmental management, strengthening the legal and institutional framework for effective coordination, promoting environmental management tools (including PES), supporting the implementation of the Forests Act 2005, and developing national standards and appropriate forest-based development mechanisms in emerging carbon markets.

The key policy statements emanating from the forestry and ecosystems section of the National Environmental Policy, include the Government of Kenya’s pledge to 1) formulate an innovative strategy to increase forest and tree cover from the current 5.9% to at least 10% as required under the Constitution 2) develop and implement a National Strategy for Rehabilitation and Restoration of degraded forest ecosystems 3) protect and conserve forests located in key water catchment areas 4) support effective implementation of the Forests Act, 2005 5) develop and implement cost-effective, objective and measurable national standards, principles and criteria of sustainable forest management and 7) develop and support appropriate forest-based development mechanisms in the emerging carbon markets. The policy proposes seven government actions to prevent this, including the development of forest-based development mechanisms in the emerging carbon markets.
4.8 The Kenya National Biodiversity Strategy and Action Plan (NBSAP)

The overall objective of the NBSAP\textsuperscript{71} is to address the national and international undertakings of the Convention on Biological Biodiversity (CBD)\textsuperscript{72}. It details the national framework of action for the implementation of the Convention to ensure that the rate of biodiversity loss is reversed, and that levels of biological resources are maintained at sustainable levels for posterity. Most of the action areas identified by the policy are very critical to REDD+ since they relate to protection and conservation of biodiversity habitats which are mostly forests.

Under the strategy, issues identified for action include conservation within protected areas, arid and semi-arid areas, forests, degraded ecosystems, threatened and alien species, genetically modified organisms, indigenous systems and knowledge. The action plan addresses other fundamental concerns of biodiversity management such as agricultural biodiversity, incentive measures, research and training, public education and awareness, impact assessment, access to genetic resources, institutional capacities and linkages, gender concerns, policy and legislation, poverty, biotechnology and other technologies, information exchange, technical and scientific co-operation, and financial resources.

5.0 FOREST RELATED LAWS

5.1 The Constitution

The Kenya Constitution, 2010 has markedly reordered Kenya’s political, social and economic setting. It reorganizes the Kenya state from a central unitary state to a devolved one based on one national government and 47 County Governments. It also has very innovative and progressive provisions on many areas ranging from human rights to land and environmental management.


\textsuperscript{72} CBD is an international legally binding treaty. The objective is to develop national strategies for the conservation and sustainable use of biological diversity.
5.1.1 Environment and natural resources in the Constitution

The Constitution of Kenya Chapter V, part 2 deals with environment and natural resources. It outlines the obligations of the national government in respect of environmental issues. The Constitution has also spread the implementation of specific national government policies on natural resources and environmental conservation including forestry to the county government. Under Article 69 the state shall ensure sustainable exploitation, utilization, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits. The state shall also work to achieve and maintain a tree cover of at least ten percent of the land area of Kenya and utilize the environment and natural resources for the benefit of the people of Kenya.

Every person has a duty to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources. The Kenyan public has the capacity to bring legal action, whether or not a person has directly suffered personal loss or injury from the action or omission of the defendant with respect to environmental matters. Previously, the Kenyan public had no loci standi in environmental matters and could therefore not legally challenge the actions of government and/or non-governmental bodies. This shows the Government has realized and learnt the importance of environmental protection and conservation. The 2010 Constitution not only seeks to restructure Kenya into a modern and democratic state but also puts in place elaborated measures to achieve this desire. In Article 10 of the Constitution, detailed treatment is given to the values and principles that should govern the operations of all entities within the State. Specifically in the process of implementing the Constitution, adopting, interpreting and applying any law or policy, it is directed that adherence be made to the national values and principles. In addition to the well accepted principles including rule of law, human rights and gender equality the Constitution requires

73 Constitution of Kenya 2010
that sustainable development considerations be taken into account. By placing sustainable development within the content of national values, the Constitution has made the drive towards environmental sustainability a constitutional and national imperative. Four articles in the new Constitution specifically address the environment, going so far as to allow individuals to seek legal redress if their environmental rights are infringed.

Moreover, Article 69 outlines the obligations of the government in respect to environment, asserting that “The State shall ensure sustainable exploitation, utilization, management and conservation of the environment and natural resources and ensure the equitable sharing of the accruing benefits.” The Constitution also mandates that the State increase tree cover to 10% of Kenya’s total land area, the minimum recommended for ecological sustainability. Our farmers’ trees, undoubtedly, will also help the nation to accomplish its commitments for the people and environment. The New Constitution provides national values and principles of governance as a basis for improving the situation. These include sharing and devolution of power, (i) the rule of law, (ii) democracy and participation of the people, (iii) equity, (iv) integrity, transparency and accountability, (v) defining, recognition, protection, and enforcement of human rights, (vi) access to information, (vii) objectivity and impartiality in decision making, and (viii) ensuring that decisions are not influenced by nepotism, favouritism, or other improper motives or corrupt practices. This provides a solid foundation—and an urgent imperative—to improve the governance situation also in the forest sector.

Pursuant to Article 162 (2) b of the Constitution of Kenya 2010, The Environment and Land Court was created by Act Number 19 of 2011 as a superior court of record with both original and appellate jurisdiction to hear matters relating to the environment and the use, occupation and title to land. The Court will be guided by a number of principles including the principle of sustainable development,

74Ibid Article 10

75 Environment and Land Act Number 19 of 2011 section 13 (a)
pre-cautionary principle, the principles of land policy\textsuperscript{76} under, the principles of judicial authority;\textsuperscript{77} the national values and principles of governance\textsuperscript{78}; and the values and principles of public service\textsuperscript{79}.

The State shall have the responsibility of ensuring sustainable exploitation, utilization, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits work to achieve and maintain a tree cover of at least ten per cent of the land area of Kenya. Protection and enhancement of intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities encourage public participation in the management, protection and conservation of the environment.\textsuperscript{80}

In order to enhance their conservation and management, the Constitution classifies all forests other than private and community forests as public land. Thus public land includes all government forests other than those lawfully held, managed or used by specific communities; and government game reserves, water catchment areas, national parks, government animal sanctuaries, and specially protected areas. The Constitution vests the public land so classified in the national government, to be held in trust for the people of Kenya, and to be administered on their behalf by the National Land Commission. The state can take advantage of these provisions to protect forests and promote their sustainable utilization and management.

The Constitution also protects every person’s right to acquire and own property of any description including forests in any part of Kenya. It prohibits Parliament

\textsuperscript{76} Article 60(1) of Constitution of Kenya 2010

\textsuperscript{77} Article 159 of the Constitution of Kenya 2010

\textsuperscript{78} Article 10(2) of the Constitution of Kenya 2010

\textsuperscript{79} Article 232(1) of the Constitution of Kenya 2010

\textsuperscript{80} Ibid Article 69
and the State from depriving a person, or limiting their enjoyment of a property on any grounds other than for a public purpose or in the public interest. Such deprivation must be in accordance with the Constitution and any Act of Parliament; requires prompt and just compensation; and must allow the affected person a right of access to a court of law. The Constitution also provides that compensation may be paid in good faith to occupants of so acquired property who may not hold title to the land. However, such compensation rights do not extend to any property found to have been unlawfully acquired. This provision can thus be used by the State to acquire threatened and illegally acquired forests with a view to protecting and managing them sustainably.

5.1.2 Forests and the 2010 Constitution

Kenya undertakes to achieve and maintain a minimum tree cover of 10% on its land area from its current cover of 5.9% of the national land area. Forests, as explained earlier, play a diversity of productive and protective functions, the latter being instrumental to water conservation, through ground water recharge and sustenance of water catchment areas. It is therefore important that the constitutional responsibility binds both the national and county governments, as the ‘state.’ However, it will be necessary to determine the specific responsibilities of the national and county governments, because each level of government exercises distinct authority over different categories of forests, and water resources. Illustratively, the Constitution defines public land to include government forests, and water catchment areas (held by national government), as well as trust lands vested in County governments, now defined as community land which in some cases comprise local authority forests, under Forest Act,


83 Article 62(1) (g).

84 Article 63(2) (d) (iii).
The national government will also exercise competence over national forest, and agriculture policy, while county governments undertake implementation, making them responsible for community and on-farm forests.

Bearing in mind the importance attached to socio-economic and ecological roles of all types of forests, including the trees outside formal forests, this constitutional obligation bears upon the Kenyan state to pursue mechanisms for increasing total acreage of private and on-farm forests, including on land that is dominantly applied to other uses, such as agriculture. This is an opportunity to fulfill constitutional obligations; it is also an opportunity for Kenya to participate and implement emerging international efforts to reduce emissions from forest degradation and deforestation (REDD) under the UN Framework Convention on Climate Change (UNFCCC).

5.1.3 Forest Management and Devolution under the 2010 Constitution

The 2010 Constitution of Kenya significantly altered the structure of national governance from centralized state, into devolved government. The government of Kenya, after the 2013 General elections, now comprises one shared national government, and 47 devolved county governments with constitutionally defined autonomy. Article 6(2) of the Constitution reiterates that governments at the national and county levels are distinct and inter-dependent and shall perform their functions while respecting the functional and institutional integrity of the other level of government. They are obligated to assist, support and consult and to liaise between each level of government in order to exchange information, coordinate policies, administration and enhance capacity. The Constitution, in mandatory terms, further requires both levels of government, and different governments at the county level to cooperate in performance of functions and

85 Section 24.
86 Article 1(4)
87 Article 189 (1) (a, b &c)
exercise of powers, including setting up joint committees, and authorities. The Intergovernmental Relations Act, 2012 gives full effect to these articles of the Constitution, proposes to set out coordination forums, and committees that bring together the President and Governors, different county governments, as well as different administrative levels within a county, in order to enhance cooperation.

5.2 Statute Law

5.2.1 Forest Laws

i) Forest Act, 2005

The Forest Act, 2005, is the main statute governing forest management and conservation in Kenya. It replaced the Forest Act of 1942, which was grossly ill-equipped to deal with the ever-increasing challenges in the forest sector. It seeks to ensure, *inter alia*, appropriate partnerships, systems of incentives, and certification standards and procedures for sustainable production and use of forests. The Act provides for the establishment, development and sustainable management of forest resources for the socio-economic development of the country. This includes conservation and rational utilization of forests. It applies to all forests and woodlands on state, local authority and private land.

The overall spirit of Forests Act is devolution of authority and responsibilities in management of forest, and promotion of partnership through increased access of benefits to the communities. It seeks to promote sustainable forest management through management plans, which are mandatory for all categories of forests in Kenya, although there is no explicit requirement in the case of private forests. A

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88 Article 189(2)

89 See PART II, to the Act.

90 Act No. 7 of 2005.

91 Former Chapter 385, Laws of Kenya, now repealed.

92 Section 2

93 Section 35.
management plan is defined by the Act as ‘a systematic programme showing all activities to be undertaken in a forest or part thereof during a period of at least five years, and includes conservation, utilization, silvicultural operations and infrastructural developments.’

The Act also creates Community Forest Associations, which allow communities to participate in the joint management of public or County forests. Furthermore, the Act granted customary use rights to communities who traditionally relied upon forests for their livelihoods, provided that they do not use the forest resources for commercial purposes. It is however clear that this statutory definition of management plans does not overtly refer to the objective of sustainability, or create an explicit obligation or responsibility for activities under such management plans to safeguard forest health or vitality. In light of provisions of article 69(1) of the Constitution, creating an overarching sustainability obligation on the Kenyan state in management of natural resources, there is need to redefine the nature, scope and sustainability objects of management plans, for all types of forests in Kenya.

ii) Energy Act

It provides the regulatory framework for energy in Kenya. The Minister is required 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. Using these powers, the Minister for Energy has made a number of regulations to support the act. In addition to this the Minister is also given power to formulate a national strategy for coordinating research in renewable energy; providing an enabling framework for the efficient and sustainable production, distribution and marketing of biomass, solar and municipal waste. REDD+ will strengthen the implementation of this

94 Energy ACT Section 103 (1)

95 These regulations are discussed in section 5.3 below, under Regulations and Bylaws
Act through promoting efficient charcoal making technologies and fast growing fuel plantations to supply fuel wood.\textsuperscript{96}

\textbf{5.2.2 Land Laws}

\textit{i) Land Act}

The Land Act\textsuperscript{97} seeks to give effect to Article 68 of the Constitution by revising, consolidating and rationalizing land laws in Kenya, as well as providing for the sustainable administration and management of land and land based resources. It applies to all land declared as public land, private land and community land under Articles 62, 64, and 63 of the Constitution, respectively (Section 3). The Act deals in detail on the administration and management of public and private land. Community land is to be managed in accordance with Article 63 of the Constitution.\textsuperscript{98} The Land Act adopts guiding values and principles of land management and administration from the Constitution. These values and principles contained in the Act shall bind all State organs, State officers, public officers and all persons in enacting, applying, or interpreting the Act, as well as in making or implementing public policy decisions (Section 4).

The Act provides for 4 forms of land tenure: freehold, leasehold, partial interest such as easement, and customary land rights (Section 5). Land management and administration under the Act is through the instrumentalities of the Cabinet Secretary and the National Land Commission. In this regard, the Cabinet Secretary is mandated to: \(a\) develop policies on land, upon the recommendation of the Commission; \(b\) facilitate the implementation of land policy and reforms;

\textsuperscript{96} Gok 2010 c

\textsuperscript{97} Land Act No. 6 of 2012

\textsuperscript{98} Article 63 (5) of the Constitution of Kenya 2010 requires parliament to enact legislation to govern the management and administration of Community Land. Pursuant to this, there is a draft Community Land Bill, 2011 to provide for the allocation, management and administration of community land. The bill is yet to be tabled in parliament.
(c) coordinate the management of the National Spatial Data Infrastructure; (d) coordinate the formulation of standards of service in the land sector; (e) regulate service providers and professionals, including physical planners, surveyors, valuers, estate agents, and other land related professionals, to ensure quality control; and (f) monitor and evaluate land sector performance (Article 6).

The Act sets forth various methods of acquiring land, including through allocation, adjudication, compulsory acquisition, prescription, settlement programs, transmissions, transfers, long term leases exceeding twenty-one years created out of private land, and any other manner prescribed in an Act of Parliament (Section 7). Part II (Sections 8-19) deals with administration of public land. In managing public land on behalf of the national and county governments, the National Land Commission is required to:

(a) identify public land, prepare and keep a database of all public land, which shall be geo-referenced and authenticated by the statutory body responsible for survey;

(b) evaluate all parcels of public land based on land capability classification, land resources mapping consideration, overall potential for use, and resource evaluation data for land use planning; and

(c) share data with the public and relevant institutions in order to discharge their respective functions and powers under this Act; or

(d) require the land to be used for specified purposes and subject to such conditions, covenants, encumbrances or reservations as are specified in the relevant order or other instrument.

Section 9 of the Act makes provision for conversion of land from one category to another. Public land may be converted to private land by alienation. It may also be converted to community land subject to public needs or in the interest of defense, public safety, public order, public morality, public health, or land use planning. Similarly, private land may be converted to public land by compulsory acquisition, reversion of leasehold interest to Government after the expiry of a lease, transfers or surrender. Community land may be converted to either private or public land in accordance with the law relating to community land enacted.
pursuant to Article 63(5) of the Constitution. It is important to note that any substantial transaction involving the conversion of public land to private land requires approval by the National Assembly or county assembly.

The Law enjoins the Commission to keep a register containing the following particulars—(a) public land converted to private land by alienation; (b) names and addresses of all persons whose land has converted to public land through compulsory acquisition or reversion of leasehold; (c) community land converted to either private or public; and (d) such other details as the Commission may direct. The Commission may make rules for the better carrying out of the provisions conversion of land from one category to another and, in particular, prescribing substantial transactions requiring approval of the National Assembly or the County Assembly; (b) prescribing anything so required; (c) regulating and controlling the conversion of land from one category to another; or (d) prescribing the factors to be applied or taken into account in determining land that is to be converted.

Further, section 10 enjoins the Commission to prescribe guidelines for the management of public land by all public agencies, statutory bodies and state corporations in actual occupation or use of public land. Such guidelines must indicate management priorities and operational principles for the management of public land resources for identified uses. Section 11 deals with Conservation of ecologically sensitive public land. It requires the Commission to take appropriate action to maintain public land that has endangered or endemic species of flora and fauna, critical habitats or protected areas. The Commission shall identify such ecologically sensitive areas that are within public lands and demarcate or take any other justified action on those areas and act to prevent environmental degradation and climate change. It must do this in consultation with existing institutions dealing with conservation.

Under Section 12, the Commission may, on behalf of the National or county governments, allocate public land by way of: (a) public auction to the highest bidder at prevailing market value subject to and not less than the reserved price;
(b) application confined to a targeted group of persons or groups in order to ameliorate their disadvantaged position; (c) public notice of tenders as it may prescribe; (d) public drawing of lots as may be prescribed; (e) public request for proposals as may be prescribed; or (f) public exchanges of equal value as may be prescribed.

The Commission shall ensure that any public land that has been identified for allocation does not fall within any of the following categories— (a) public land that is subject to erosion, floods, earth slips or water logging; (b) public land that falls within forest and wild life reserves, mangroves, and wetlands or fall within the buffer zones of such reserves or within environmentally sensitive areas; (c) public land that is along watersheds, river and stream catchments, public water reservoirs, lakes, beaches, fish landing areas riparian and the territorial sea as may be prescribed; (d) public land that has been reserved for security, education, research and other strategic public uses as may be prescribed; and (e) natural, cultural, and historical features of exceptional national value falling within public lands; (f) reserved land; or (g) any other land categorized as such, by the Commission, by an order published in the Gazette. Commission shall also set aside land for investment purposes, subject to Article 65 of the Constitution. In so doing, the Commission must ensure that the investments in the land benefit local communities and their economies.

Further, the Commission may, in consultation with the National and county governments, allocate land to foreign governments on a reciprocal basis in accordance with the Vienna Convention on Diplomatic Relations. At the expiry, termination or extinction of a lease granted to a non-citizen, reversion of interests or rights in and over the land shall vest in the national or county government. But no such allocation of public land would occur unless the land in question has been planned, surveyed and serviced and guidelines for its development prepared in accordance with section 16 of this Act.

Public land so allocated shall not be sold, disposed off, sub-leased, or sub-divided unless it is developed for the purpose for which it was allocated. In case of breach
of this condition, the allocated land shall automatically revert to the national or county government. And in effecting such allocation, the Commission may impose any terms, covenants, stipulations and reservations, including— (a) that the applicant shall personally occupy and reside on the land for a period set by the Commission; (b) the applicant shall do such work and spend such money for permanent improvement of the public land within the period specified by the Commission; or (c) the consideration that must be paid for a disposition of public land.

The law requires the Commission to make regulations prescribing the criteria for allocation and for connected matters. It also enjoins the Commission to make regulations prescribing the criteria for allocation. Such procedures may include (a) forms of ownership and access to land under all tenure systems; (b) the procedure and manner of setting aside land for investments; (c) procedures to be followed with respect to auction and disposition of land; (d) appropriate mechanisms for repossession of land given to citizens at the expiry of a lease; and (e) mechanisms of benefit sharing with local communities whose land have been set aside for investment.

Part x of the Act deals with partial interest in land including easements, and analogous rights. The Act retains all easements made or coming into force on or after the commencement of the Act.\textsuperscript{99} It lists the nature of easements to include any rights to do something over, under or upon the servient land\textsuperscript{100}; any right that something should not be so done; any right to require the owner of servient land to do something over, under or upon that land; and any right to graze stock on the servient land. This provision can provide an opportunity for conserving or restoring threatened forests or for using open or degraded lands for afforestation or reforestation programmes.

\textsuperscript{99} Section 137 of the Land Act Number 6 of 2012

\textsuperscript{100} The servient land, for purposes of the Act, refers to the land of the person by whom an easement is created, and the land for the benefit of which any easement is created is referred to as the ‘dominant land’. See the Land Act. Section 136
The Act also requires the National Land Commission to develop rules for the conservation of land based natural resources\textsuperscript{101}. It specifically requires rules relating to benefit sharing, access use and co-management of forests by communities who have customary rights to the forests, measures for the protection of critical ecosystems and habitats, and promotion of income generating natural resource conservation programmes. These provisions are important for promoting use of land and recognizing tenurial aspects of REDD+. They provide anchorage for REDD+ related regulations through the National Land Commission.

\textit{ii) The Trust Land Act, 1970 (Revised 2009)}

This Act was enacted to govern all trust lands in Kenya.\textsuperscript{102} It elaborates procedures to be followed when the government wants to set aside trust land for public purposes. Such public purposes may include regulating the use and conservation of any area; regulating issues relating to tenure and licenses; and for the protection of trees and forest produce on land not within a forest area within the meaning of the Forests Act.

The challenge with this Act is that it vests trust land in the local authorities or county councils. These institutions ceased to exist after the devolved system of governance brought by the 2010 Constitution.\textsuperscript{103} Despite this, the Trust Land Act has not been repealed nor recommended for review. As such, the Act is technically in place yet its roles have seemingly been transferred to the County Governments. The county governments manage all the environmental resources within the trust land under their jurisdiction and control the development of that land. They also regulate the use and conservation of these lands, including the

\textsuperscript{101}Section 19, Land Act, Act Number 6 of 2012

\textsuperscript{102}Trust land consist of areas that were occupied by the natives during the colonial period and which have not been consolidated, adjudicated or registered in individual or group names, and native land that has not been taken over by the government.

\textsuperscript{103}Trust lands are now vested in and held by the county governments in trust for the people resident in the county.
management of forests, wildlife and water resources. In particular, they regulate the felling or removal of any tree and forest produce, ensure that the land is conditioned and can prohibit the occupation of any trust land. The County governments also deal with matters relating to tenure in trust lands.

iii) Other Acts

As stated, implementing the land and environment provisions of the new Constitution will require radical policy, legislative and institutional reforms. At least six pieces of legislation are specifically identified. These relate to 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). With these legislative reforms, new institutions are poised to be created.

Article 67 establishes the National Land Commission as the overall public body responsible for managing land on behalf of national and county governments. The functions and powers of the commission are governed by the National Land Commission Act. The Act also makes further provisions as to the qualifications and procedures for appointments to the Commission, as well as provisions to give effect to the objects and principles of devolved government in land management and administration, and for connected purposes. Just recently, an Act of Parliament established the land and environment court. The implication of this Court for the continued existence of the Land and Environment Division of the High Court is yet to be clearly understood. Furthermore, considerable sectoral policy reforms will have to be undertaken in virtually all sectors to bring the existing policies in line with the new structures and principles embodies in the new Constitution.

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104Section 65, Chapter 288 Laws of Kenya

105Ibid

106The National Land Commission Act No. 5 of 2012
5.2.3 Environment Laws

iv) Environment Management and Coordination Act (EMCA)

This Act provides an appropriate legal and institutional framework for the management of the environment as well as an administrative co-ordination of the diverse sectoral initiatives that is necessary to improve the national capacity for the management of the environment. Implementation of this Act is guided by the principle of public participation in the development of policies, plans and processes for environmental management. It also recognizes the cultural and social principles traditionally applied by communities in Kenya for the management of natural resources.

It establishes the National Environment Management Authority mandated with the overall responsibility of environmental management throughout the land. Specifically, the authority is mandated to conduct an Environmental Impact Assessment on such terms and conditions as may be appropriate and necessary to facilitate sustainable development and sound environmental management.\textsuperscript{107} EMCA makes specific provisions for the sustainable use of hill tops, hill sides, mountainous areas and forests, including controlling the harvesting of forests in such areas. It requires every District Environment Committee (DEC) to identify and notify the Director-general of NEMA of hill tops, hill sides and mountainous areas within their jurisdiction which are at risk of environmental degradation. The DECs are then required to specify which of such areas are to be targeted for afforestation or reforestation, and to take measures to plant trees or other vegetation.\textsuperscript{108}

In addition, EMCA empowers courts to grant, on an application by a person or group of persons, an environmental easement or an environmental conservation

\textsuperscript{107} Environmental Management and Co ordination Act of 1999 Section 63

\textsuperscript{108} Section 44-47 The Environmental Management and Coordination Act No. 8 of 1999.
order, with the aim of furthering the principals of environmental management.\textsuperscript{109} Such environmental easements may be imposed on and shall thereafter attach to the land in question in perpetuity or for a term of years or for an equivalent interest under customary law as the court may determine.\textsuperscript{110} Among other reasons, the Act states that an environmental conservation order may be imposed on burdened land so as to; preserve flora and fauna; preserve any outstanding geological, physiographical, ecological, archeological or historical features of the burdened land; preserve scenic view; permit persons to walk in a defined path across the burdened land; preserve the natural contours and features of the burdened land; prevent or restrict the scope of an agricultural activity on the burdened land; create and maintain works on burdened land so as to limit or prevent harm to the environment; and create or maintain migration corridors for wildlife.\textsuperscript{111} These reasons can be relied upon to conserve and sustainably manage forests. The environmental easements and conservation orders can thus be a very useful tool for conservation and sustainable utilization of forests, and for enhancing success of REDD+ in Kenya.

\textit{v) Water Act}

This Act provides for the management, conservation use and control of water resources. It encourages the devolution of power to regional service boards who in turn will license water service providers. It provides for the establishment of the Water Resources Management Authority with powers to develop principles, guidelines and procedures for the allocation of water resources; and protect and manage water catchment areas.\textsuperscript{112} The Act is ideal for catchment protection and protection of wells and springs that occur in the forest because it does support community involvement in management of these catchments through catchment management strategy for the management, use, development conservation,
protection and control of water resource within each catchment area\textsuperscript{113}. The Act supports the user-pay principle as proposed in the Forests Act\textsuperscript{114}. Kenya Forest Service can therefore work with water user groups (consumers), service providers and water service boards to conserve catchment forests.

\textit{vi) Wildlife (Conservation and Management) Act}

The Act was adopted in 1976 but since then 8 amendments and revisions have been done with the latest being in 1990. As provided for in the Act, the process of gazettement and de-gazettement requires parliamentary approval so the heightened level of decision-making and legitimacy of the whole process ensures no grabbing of protected areas\textsuperscript{115}.

\textit{vii) Agriculture Fisheries and Food Authority Act No. 13 of 2013}

This Act repealed the Agriculture Act Chapter 318. It promotes soil and water conservation and prevents the destruction of vegetation. Part IV of the act provides for policy guidelines on Development, preservation and utilization of Agricultural Land as well as provide for the rules of utilization of such land. \textsuperscript{116} It also provides for a declaration by the cabinet secretary that a plant is a noxious or invasive weed and thus its need to be eliminated.\textsuperscript{117} It can help address the biggest threat to forest conservation i.e. short term shifting cultivation or the slash/burn agriculture, which is the main force behind forest degradation. Public participation is provided for by ensuring effective participation of farmers in the governance of the agricultural sector in Kenya, by encouraging close consultation with all registered farmers’ organizations in the development of policies or regulations and before the making of any major decision that has

\textsuperscript{113} Ibid section 15

\textsuperscript{114} Ibid section 94, 105

\textsuperscript{115} Section 7

\textsuperscript{116} Agriculture Fisheries and Food Authority Bill Act No 13 of 2013 Section 21, 22

\textsuperscript{117} Ibid section 24
effect on the agricultural sector.\textsuperscript{118} Under the Act, the cabinet secretary can make rules to prohibit, regulate, control clearing of land for cultivation, thus complementing the Forests Act.

\textit{viii) National Museums and Heritage Act, No. 6 of 2006}

The Act has been used for gazettement of areas of historical importance and threatened heritage e.g. the Kayas at the coast have been protected under this Act. It also provides for the establishment, control, management and development of national museums and the identification, protection, conservation and transmission of the cultural and natural heritage of Kenya. NMK's mandate does not adequately cover management of forest resources in these sites as most of the Kayas are now under threat from cultivation, charcoal burning and mining.

\textit{ix) Fisheries Act, 1991 (Revised 2012)}

The Act regulates trout fishing in the forests and protects fish breeding areas\textsuperscript{119} and is relevant to mangrove management at the coast.

5.3 Regulations (and Bylaws)

\textit{i) Forest (Charcoal) Regulations, 2009}\textsuperscript{120}

These regulations aim to legitimise sustainable charcoal production and give guidance and regulation to the industry to in effect reduce this significant driver of deforestation (KFS, 2007), and the Environmental Management and Coordination Act, while citing broad overarching environmental policies, mandates the sustainable use of forest areas within the country and controls the harvesting of forests and any natural resources to protect water catchment areas, prevent soil erosion and regulate human settlement. The Trusts Land Act, revised

\textsuperscript{118} Ibid section 40
\textsuperscript{119} Legal Notice Number 86 of 2012.
\textsuperscript{120} Legal Notice Number 188 of 2009
in 2009, provides licensing conditions governing the protection and removal of timber and forest produce, in areas not included in the Forests Act.


These regulations were made to promote energy efficiency among owners or occupiers of industrial, commercial and institutional facilities. It deals with inter alia, energy consumption rating, energy management policy, energy audits, energy investment plans, energy conservation measures and licensing of energy auditors or energy audit firms. The regulations do not specifically mention REDD+ but they allow an owner or occupier to investigate the inclusion of their energy investment plans into a clean development mechanisms or any other carbon finance projects.


The Energy (Solar Photovoltaic Systems) Regulations, 2012 apply to solar PV system manufacturers, importers, vendors, technicians, contractors, system owners, as well as to solar PV system installation and consumer devices. The regulations aim to promote adoption of solar technology in Kenya. The regulations govern licensing, use and disposal, standardization, inspection as well as offences and penalties.

iv) The Energy (Solar water heating) regulations, 2012

These regulations requires, within a period of five years, all premises within a local authority with hot water requirements of a capacity exceeding one hundred litres per day to install and use solar heating systems. The regulations also allow an owner or occupier possible inclusion of a relevant solar water heating system into a clean development mechanism or any other carbon finance projects.

121Legal Notice Number 102 of 2012
122Legal Notice Number 103 of 2012.
123Legal Notice Number 43 of 2012
There are also proposed Energy (Improved Biomass Cook stoves) Regulations, 2013 currently in draft form. The draft regulations cover licensing, manufacturing, distribution, inspection of improved biomass cook stoves, as well as offences and penalties. They put strict conditions to be met by an individual or company before being licensed as a technician, manufacturer, importer or distributor. These regulations are particularly very critical for REDD+ given that use of wood fuel is one of the key drivers of deforestation and forest degradation in Kenya. Efficient use of wood fuel would thus go a long way in conserving forests and enhancing forest carbon stocks.

6.0 FOREST INSTITUTIONS
Critical to success of REDD+ is a suitable institutional architecture for decision-making and implementation. The current institutional framework comprises: various ministries concerned with natural resource sectors like land, water, agriculture and wildlife; numerous government agencies created under various laws; and a vast range of institutions established under the Environmental Management and Co-ordination Act.124 There are also many civil society organizations (CSOs) and private sector institutions involved in forest-related activities which are relevant to REDD+.

6.1 National Government Institutions
These include ministries (departments), lead agencies125 and constitutional bodies such as the CIC and the National Land Commission. Others are the various governmental agencies such as the judicial and quasi-judicial bodies (like the Environment and Land Court, the Public Complaints Committee, the National Environment Tribunal) and the legislature, as well as policy oversight and coordinating bodies like the National Environment Management Authority

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124 Act No. 8 of 1999.
125 A lead agency is defined in Section 2 of EMCA as “Any government ministry, department, parastatal, state corporation or local authority, in which any law vests functions of control or management of any elements of the environment or natural resources.”
(NEMA), the National Environment Council (NEC) and the Commission on Administrative of Justice (Ombudsman).

i) National Environment Management Authority (NEMA)

NEMA is a state corporation that is mandated with the responsibility of Policy coordination and harmonization, conducting Environmental impact assessment and compliance under EMCA and resolution of inter-sectoral / cross-sectoral disputes through the Environmental Tribunal. With respect to forests and forest conservation, EMCA gives every Kenyan: the right to complain on environmental degradation; provides for protection of forests; allows the Director General to enter into contractual agreement with private land owners with a view to declaring such land forest land and provides for Environmental Impact Assessment (EIA) of forestry related developments.

ii) Kenya Wildlife Service (KWS)

The Kenya Wildlife Service (KWS) is the government lead agency in charge of protected areas and therefore has capacity on inventory and monitoring in protected areas, with a focus on habitat change and wildlife monitoring. Kenya Wildlife Services (KWS) has a mandate for enforcement of the rules and regulations governing the management of wildlife in parks and nature reserves that also contain forests. The Wildlife (Conservation and Management) Act not only defines wildlife to include flora, but section 15 empowers the Minister to declare special areas known as protection areas, within national parks, game reserves and local sanctuaries for ensuring the security of animal or vegetable life or for preservation of the habitat and ecology thereof. Further the MoU signed between the KWS and the then Forest Department for joint management of forests for a duration of 25 years. The MoU aims primarily at the conservation of biological diversity in Kenya and the maintenance of the functioning of ecological processes such as water catchment in forested areas.

126 Chapter 376, Laws of Kenya (Revised Edition 1992)
iii) *Kenya Forest Service*

This body is established by the Forest act 2005 as a semi-autonomous body, which has the overall responsibility for formulating policies regarding the management, conservation and utilization of all types of forest areas in the country. Its mission is to enhance conservation and sustainable management of forests and allied resources for environmental stability and socio-economic development. The core functions of KFS are to:

- Sustainably manage natural forests for social, economic and environmental benefits.
- Increase productivity of industrial forest plantations and enhance efficiency in wood utilization.
- Promote farm forestry and commercial tree farming.
- Promote efficient utilization and marketing of forest products.
- Promote sustainable management of forests in the dry lands.
- Protect forestry resources and KFS property.
- Develop and maintain essential infrastructure for effective forest management and protection.
- Develop manpower for the forestry sector.
- Develop forestry resources for education, research and community development.
- Build capacity on formation and operationalization of conservation institutions.
- Collect all revenues and charges due to the Service in regard to forest resources, produce and services.

iv) *Kenya Forestry Research Institute (KEFRI)*

The Kenya Forestry Research Institute (KEFRI) was established in 1986 to carry out research in forestry and natural resources. The institute conducts research in forestry, cooperates with other research bodies both nationally and internationally, and establishes partnerships with other organizations and
institutions. KEFRI’s goals include contributing to Vision 2030 by developing technologies for the sustainable development and utilization of forests and natural resources. The objectives include generating knowledge and technologies for forest development, conservation and management, strengthen research and management capacity, and improve seed production, distribution and marketing, to disseminate forest research financings and to strengthen linkages with stakeholders.

v) National Museums of Kenya

This is established under the National Museums and Heritage Act\textsuperscript{127}. NMK is a multi-disciplinary institution whose role is to collect, preserve, study, document and present Kenya’s past and present cultural and natural heritage. This is for the purposes of enhancing knowledge, appreciation, respect and sustainable utilization of these resources for the benefit of Kenya and the world, for now and posterity. NMK has two institutes; The Research Institute of Swahili Studies of Eastern Africa (RISSEA) and the Institute of Primate Research (IPR). NMK issues various research permits for collection and export of antiques and monuments.

vi) Ministry of Environment, Water and Natural Resource

This ministry was created after the 2013 General Election by restructuring and/or merging several ministries dealing with the environment and natural resources. Thus most functions of the ministries of Environment and Mineral resources; Water and Irrigation; and Forestry and Wildlife fall under this ministry.\textsuperscript{128} In the precedent government structure, the ministry in charge of water was mandated with the responsibility of gazettement of water catchment. The Water Resources

\textsuperscript{127} Act No. 6 2006

\textsuperscript{128} At the time of writing this paper the restructuring of the ministries were not yet clear. For example it was not clear whether issues related to wildlife would be handled by this ministry or by the Department of Tourism under the Ministry of East African community (EAC) Affairs, Commerce and Tourism, or whether irrigation issues would fall here or under the Ministry of Agriculture, Livestock and Fisheries.
Management Authority is mandated to manage and protect water catchments;\textsuperscript{129} where the Water Resource Management Authority is satisfied that special measures are necessary for the protection of a catchment area or part thereof, it may, with the approval of the Minister, by order published the Gazette declare such an area to be a protected area. The Authority may impose such requirements, and regulate or prohibit such conduct or activities, in or in relation to a protected area as the Authority may think necessary to impose, regulate or prohibit for the protection of the area and its water resources\textsuperscript{130}.

In addition, the ministry in charge of Forestry and Wildlife was tasked with the mission of providing a conducive environment for the practice and promotion of sustainable and participatory management of forestry and wildlife resources in Kenya. Specifically its duties included 1) the formulation, coordination and monitoring or development policies including of the Forestry Development Policy and Wildlife Conservation Policy 2) the development of forests, re-afforestation, and agroforestry as well as water catchment area conservation 3) to collaborate with stakeholders and facilitate the management and conservation of forestry and wildlife resources 4) the promotion of conservation education programmes 5) to facilitate the utilization of forestry and wildlife products 6) to develop and enhance human resource management and physical infrastructure for Forestry and Wildlife resource management 7) to facilitate the dissemination of research findings in forestry and wildlife resources and to monitor, evaluate and coordinate the Kenya Forestry Research Institute, the Kenya Forest Service , the Kenya Wildlife Service and the Wildlife Clubs of Kenya with regards to their operations to implement the Strategic Plan. The Ministry of Forestry and Wildlife has been consulted in the process of the R-PIN preparation for Kenya. It was also expected to host the Kenya REDD+ Readiness efforts steered by an Inter-Sectoral National REDD+ Steering Committee (NRSC).

\textsuperscript{129} Sec 8 (f)

\textsuperscript{130}Sec Chapter 372 sec 17
Some functions of the former Ministry of Environment and Mineral Resources (MEMR) are expected to fall under this ministry.\textsuperscript{131} MEMR was mandated to monitor, protect, conserve and manage the environment and natural resources through sustainable exploitation for socio-economic development aimed at eradication of poverty, improving living standards and ensuring that a clean environment is sustained now and in the future. The ministry comprised of various institutions including the National Environment Management Authority (NEMA) and the Department of Resource Surveys and Remote Sensing (DRSRS). This ministry was charged with several core functions including environment and natural resources policy formulation, analysis and review; conservation of environment; continuous development of geo-database for integrated natural resources and environmental management systems; conducting applied research and dissemination of research findings in land resources and geology; and promoting, monitoring and coordinating environmental activities as well as enforcing compliance of environmental regulations and guidelines. Most of these functions are expected to be carried out by the new ministry of Environment, water and Natural Resources. It is only the functions related to mining that have been hived off and now are the responsibility of the Ministry for Mining.

\textit{vii) National Land Commission}

The Constitution creates the National Land Commission under article 67 (1) and it gives the commission extensive functions which include to manage public land on behalf of the national and county governments, recommend a national land policy to the national government, advice the national government on a comprehensive programme for the registration of titles in throughout Kenya and to conduct research on land and the use of natural resources. Kenya National Land Commission will also investigate present or historical land injustices and recommend redress, encourage the application of traditional dispute resolution

\textsuperscript{131}The new cabinet structure also created the Ministry of Mining which is expected to deal with exploration and extraction of oil and solid minerals
mechanisms in land conflicts, assess tax on land and premiums on immovable property and have over-sight over land use.

The National Land Commission Act\textsuperscript{132} was enacted to make further provision as to the functions and powers of the NLC as well as qualifications and procedures for appointments to the Commission. The Act also makes provisions to give effect to the objects and principles of devolved government in land management and administration, and for connected purposes.

A number of provisions relevant for forest governance can be discerned from this Act. For instance, the Act empowers the commission to ensure that public land and land under the management of designated state agencies are sustainably managed for their intended purpose and for future generations.\textsuperscript{133} This provision can be relied on to ensure that KFS, KWS and other state agencies sustainably manage forests under their management. The Act also requires the commission to manage and administer all unregistered trust land and unregistered community land on behalf of the county government.\textsuperscript{134} Trust land forests and forests occurring in unregistered community land can be sustainably managed relying on this provision. The Act empowers the Commission to make regulations to better operationalize the Act.\textsuperscript{135} Such regulations can provide the basis for protection and sustainable utilization of forests falling on land under the jurisdiction of the NLC.

In addition, the Act empowers the Commission, within five years of commencement of the Act, to review all grants or dispositions of public land to establish their propriety or legality, and to make a determination. Such determination may include directing the Registrar to revoke the title if it was

\textsuperscript{132}Act Number 5 of 2012

\textsuperscript{133}Ibid, at Section 5 (2)

\textsuperscript{134}Ibid

\textsuperscript{135}Supra note 108, at Section 36
acquired in an unlawful manner, and taking appropriate corrective steps. This provision can be used to identify illegally acquired forests on public land reverting them to the government for purposes of sustainably using and managing them. The Act empowers the Commission, in consultation and cooperation with the national and county governments, to establish county land management boards to manage public land. Among other functions, the county management boards are required to, subject to the physical planning and survey requirements, process applications for allocation of land, change and extension of user, subdivision of public land and renewal of leases. This role has direct implications on forests falling on such land, hence can be used for their sustainable management.

viii) Environment and Land Court

This court was established in 2011 by the Environment and Land Court Act to give effect to Article 162(2) (b) of the Constitution. It establishes a superior court with both original and appellate jurisdiction to hear and determine disputes relating to the environment and the use and occupation of, and title to, land, and to make provision for its jurisdiction functions and powers. The court is to be guided by a number of principles, including:

- public participation in the development of policies, plans and processes for the management of the environment and land;
- cultural and social principles traditionally applied by any community in Kenya for the management of the environment or natural resources in so far as the same are relevant and not inconsistent with any written law;
- international co-operation in the management of environmental resources shared by two or more states;
- intergenerational and intra-generational equity;

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136 Supra note 108, at Section 14
137 Supra note 108, at Section 18
138 Act Number 19 of 2011
139 Section 18: Environment and land Court Act of 2011
• polluter-pays principle; and
• pre-cautionary principle

These principles could help ensure entrenchment of environmental sustainability in the determination of disputes relating to land, forests and the environment.

In addition, the court’s jurisdiction\textsuperscript{140} has a direct bearing on forest governance and thus has implications for REDD+. For instance, the court has jurisdiction over disputes relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources. The court also has powers to hear and determine disputes relating to compulsory acquisition of forest lands, since the Act gives it jurisdiction over disputes relating to compulsory acquisition of land. The court also has jurisdiction over disputes relating to land administration and management; public, private and community land; and any other dispute relating to environment and land. The court thus has a big role to play in forests management since forests may fall under any of these categories of land.

\textit{viii) REDD+ Institutions}

Other than the broad forest governance framework institutions, there are institutions created recently to specifically manage the REDD+ readiness and implementation process. Prior to the 2013 general election, the presidential circular on Ministerial responsibilities vested climate change coordination activities on the ministry in charge of Environment while the mandate on forest conservation and management was vested in the ministry in charge of Forestry and Wildlife.\textsuperscript{141} With the new ministerial structure issued by the new government, these responsibilities are expected to fall under the Ministry of Environment, Water and natural Resources. Following proposals in the National Climate

\textsuperscript{140}Section 13: Environment and land Court Act of 2011

Change Response Strategy (NCCRS)\textsuperscript{142}, a Climate Change Secretariat was established within the Ministry of Environment and Mineral Resources\textsuperscript{143} to be responsible for all climate change activities. The proposals required the secretariat to be backed by appropriate climate change policies and laws and to have powers to enforce new laws and regulations relating to climate change. According to Kenya’s REDD Readiness Preparation Process (R-PP)\textsuperscript{144}, the policy, legal and institutional arrangements of REDD+ will be designed within the institutional framework proposed by the NCCRS (Figure 1).


\textsuperscript{143}The new cabinet structure after the 2013 election now has the Ministry of Environment, water and Natural resources

The management arrangements for implementing REDD+ will be linked to the division dealing with REDD+, Land Use and Land Use Change. Linked to the REDD+ and Land Use Division, a four tier structure has been created to oversee the evolving REDD strategy (Figure 2). It consists of a National REDD+ Steering Committee, a Technical Working Group, a National REDD+ Coordinating body,
and the REDD+ Component Task Forces and Local Conservancy Officers below that.\textsuperscript{146} These institutions are briefly discussed below.

- **The National REDD+ Steering Committee (RSC)**

The RSC’s roles are *inter alia*, policy guidance and implementation of REDD+ activities; national coordination of inter/intra-sectoral REDD+ activities; resource mobilization; assurance of timely delivery of a national REDD+ strategy, national reference emission level and an effective carbon monitoring system; quality control of REDD+ preparedness deliverables; and providing a mechanism for International collaboration with other REDD+ processes. The committee is chaired by the Principal Secretary in the Ministry responsible for Forestry, with KFS and KEFRI providing secretariat services. RSC membership comprises the Principal Secretaries from the ministries in charge of Environment, Water and Natural Resources; Energy; Planning; and Finance as well as the Directors of KFS, KEFRI and NEMA. Others are IUCN, WWF, KFWG, a representative from Universities, UNDP/UNEP, FAO and the Donor Coordination Group. At the time of writing this paper, it was not clear whether recommendations to include a representative of the National Association of Community Forest Associations (NACOFA) in the committee had had been effected.

- **REDD Technical Working Group (TWG)**

The current Technical Working Group (TWG) comprises about 40 individuals who participated in meetings, consultations, drafting of text, revisions and leading consultations since November 2009. The TWG is currently divided into three subgroups - Consultation and Participation; Methodology; and Policy & Institutions. The subgroups and the current TWG are expected to disband, and the new TWG for R-PP implementation will be redefined as a smaller entity bringing together specific expertise required in this phase. Among other qualifications, members are expected to have expertise in forestry, finance, land

use, agriculture, wildlife management, range management, and timber production and the management of private sector enterprises. In addition, there will be one representative from CSOs, one representative from community forest associations, one representative from water resource users groups, one representative from indigenous communities living in forests. The TWG is expected to play a key advisory role for the National REDD+ Steering Committee, and to liaise with the National REDD+ Coordination Office in carrying out operationalization of the R-PP. Specifically, it will be responsible for oversight of the R-PP implementation process, and be responsible for managing the monitoring and evaluation activities.

- **The National REDD+ Coordination Office (NRCO)**

The National REDD+ Coordination Office (NRCO) is proposed to be constituted immediately upon approval of the R-PP by the FCPF. The Secretariat, which currently consists of part time KFS staff, will be replaced by this NRCO consisting of 15 full-time staff dedicated to RPP implementation activities. The NRCO will be dedicated to implementing REDD+ activities including coordination of work carried out by various Task Forces, Communications of the overall REDD+ process and consultation, conflict resolution and grievances management, Finance management and any other duties relevant for strategy formulation.
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Figure 2 Proposed REDD+ Management structure in Kenya  

- **REDD+ Component Task Forces**

The proposed REDD+ Component Task Forces are small groups comprising members elected according to the subject matter of the REDD Strategy they will work on, and to the possible demonstration sites for that task force. The task forces are expected to include task force members that together have the expertise required for the design and oversight of each particular strategy.

6.2 County Government Institutions

Devolution has brought with it important questions on the manner in which resources and revenues would be managed and shared in Kenya. These considerations are already brooking a sense of nativity and first rights claims to

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147Source: Kenya’s REDD Readiness Preparation Proposal
the benefits accruing from natural resources found within counties. Article 176 (read together with the First Schedule) establishes 47 County governments, each with a county assembly and county executive committee. The County Government Act, which seeks to give effect to Chapter Eleven of the Constitution, provides for county governments' powers, functions and responsibilities to deliver services. In so doing, it further elaborates the management of the affairs of the County Assembly (Article 177, 178 and 185), the county executive committee and the county governor (179 to 183). In addition, the Act elaborates on the important issue of public participation (Article 196) in the affairs of county governance as well as issues of community and cultural diversity, and concern for minorities (Article 197).

The principles of planning and development facilitation, as detailed in the Act, lay a firm foundation for sustainable management of forests and other natural resources within the counties. The principles shall *inter alia*, integrate national values in all processes and concepts. The national values as given in the constitution include participation of the people, equity, good governance and sustainable development. Planning and development in a county is also required to observe intra and intergenerational equity. The principles protect the right to self-fulfillment within the county communities; promote the pursuit of equity in resource allocation within the counties; and with responsibility to future generations. The rights and interest of minorities and marginalized groups and communities are to be protected and integrated in county planning and development. More specifically, county planning and development is required to protect and develop natural resources in accordance with national and county government policies, and to effectively mobilize resources for sustainable development.

A number of the stated objectives of county planning show the Act’s intention to ensure sustainable management of the counties’ forests and other natural resources. The objectives start with the requirement for county government to work towards the achievement and maintenance of a tree cover of at least ten per cent of the land area of Kenya as provided in Article 69 of the Constitution.
County planning also aims to ensure productive use of scarce land, water and other resources for economic, social, ecological and other functions, and to maintain a viable system of green and open spaces for a functioning eco-system. Another objective of county planning is to protect the historical and cultural heritage, artifacts and sites within the county. This objective can be relied on to protect forests with cultural heritage such the Kaya forests and Kakamega forest.

The Act obligates the county planning authorities¹⁴⁸ to plan for the county and to ensure that public funds are not appropriated outside the plans. In developing the county planning framework, planning authorities are required *inter alia*, to integrate economic, physical, social, environmental and spatial planning; and to promote public participation by incorporating non-state actors in the planning processes.

In addition, the County Government Act makes further provisions as to the roles of the county assembly, which include implementing specific national government policies on natural resources and environmental conservation, including forestry. The county assembly is also mandated to approve the budget and expenditure of the county government, approve the borrowing by the county government; and approve county development planning. These functions all have implications for sustainable and effective forest governance.

### 6.2.1 Transition to County Governments

The new Constitution establishes a two-tier governance system at the national and county level. An Act of Parliament, the Transition to Devolved Government Act, has been enacted to provide the framework for transition to devolved government pursuant to section 15 of the Sixth Schedule to the Constitution. Part II (Sections 4–22) of the Act establishes the Transition Authority as the key operational mechanism for the transition. Established under Article 4, the

¹⁴⁸The Act requires the county government to designate county departments, cities and urban areas, sub-counties and Wards as planning authorities of the county
Authority comprises a chair and eight members – all of whom must be graduates with experience, assisted by the Office of the President, Attorney General and the state departments in charge of devolution, public service, finance, planning and justice (Section 5 and 6).

The functions of the Authority are categorized into phase one and phase two activities (Section 7 of the Act and 4th Schedule of the Constitution). Phase I is the time of operation of the Authority from inceptions to the date of the first general election. Phase II is the period of three (3) years after the first general election.

In fulfilling its mandate in line with the Fourth Schedule of the Constitution, the Authority is required to establish resource needs, including inaugural county budgets, and evaluate the sustainability of on-going activities (Section 7). It is also required to develop the criteria for the phased or asymmetric transfer of functions, and previously shared assets, liabilities and staff of national and local governments. The Authority is also required to evaluate and determine capacity needs and the nature of requisite capacity building need. It is imbued with extensive powers of access to information, data and interviews to enable it to perform these functions (Section 8. The executive functions of the Authority are undertaken under a Secretary supported by such staff (Section 17) and committees (Section 20) as is necessary to deliver its obligations.

In the performing its functions and exercising its powers, the Authority must: be accountable to the people of Kenya and ensure their participation in the transition process; facilitate the transition to the devolved system of government transparently, objectively and fairly; promote and sustain fair procedures; ensure technical and administrative competence; be non-partisan and apolitical; and promote the national values and principles provided under the Constitution (Section 14). Part III (Sections 23–24) elaborates on the phased transfer of functions, initially determined by the Authority, but eventually applied for by individual county governments (Section 23). The criteria for the transfer of functions include the existence of adequate legislation, frameworks,
administrative capacity, infrastructure, financial management systems, plans, and other pertinent variables for the delivery of the service (Section 24).

6.2.2 County Governments

County governments in Kenya are to be governed in accordance with the County Government Act. The Act seeks to give effect to Chapter Eleven of the Constitution by providing for county governments’ powers, functions and responsibilities to deliver services. In so doing, it further elaborates the management of the affairs of the County Assembly (Article 177, 178 and 185), the county executive committee and the county governor (179 to 183). In addition, the Act elaborates on the important issue of public participation (Article 196) in the affairs of county governance as well as issues of community and cultural diversity, and concern for minorities (Article 197). Finally, it prescribes uniform norms and standards for the establishment and abolition of county public services, and the appointment and disciplining of officers at that level (Article 235).

Section 4 of the Act empowers counties to enact legislation giving them independent identities (flags; court of arms; and public seals). This underscores Article 6(2)’s provision that the national government and county governments are “distinct and [even if] interdependent.” Part II (Section 4–6) elaborates on the functions and powers of the county government, emphasizing its constitutional authority to enter into contracts, acquire and hold and dispose of assets, and delegate functions, such as through sub-contracts and partnerships.

In relation to environmental governance, Part VIII (Sections 85–90) of the proposed legislation focuses on principles of citizen participation, and also addresses their right to petitioning the county government which has an obligation to “respond expeditiously”, including conducting a referendum of pertinent issues. In addition, Part IX (Section 91–95) addresses the principles and objectives of, and frameworks for communication, that ensure access to information while also promoting the inclusion and integration of minorities.
These aspirations will be enhanced through civic education, whose principles, purposes, objectives and frameworks are addressed in Part X (Sections 96–99).

According to Section 102, “(a) county government shall plan for the county and no public funds shall be appropriated outside a planning framework developed by the county executive committee and approved by the County Assembly.” This planning function is the focus of Part XI (Sections 100–113), which outlines its principles, objectives and output – the five-year county integrated development plan, incorporating sectoral and spatial plans, as well as those of cities and municipalities. The part underscores the link between the plan, its action plans, the county budget and performance indicators.

Finally, Section 113 emphasizes public participation in all these activities. The principles and standards of, and frameworks for, public service delivery are the subject of Part XII (Sections 114–119). The emphasis is on equity, efficiency, accessibility, nondiscrimination, transparency, accountability, information sharing and subsidiarity, alongside a focus on basic needs, monitored through Citizen Service Centres at all levels of the county government. The part also discusses fairness in setting tariffs, Section 118 providing that access to basic services for poor households should be ensured through tariffs covering only operating and maintenance costs. The part mandates assistance to needful county governments by the ministry in charge of intergovernmental relations, to ensure their service delivery.

Part XIII (Sections 120–128) provides procedures for the suspension of county governments. Among the reasons contemplated are conflict or war, and actions deemed contrary to the interests of its citizenry. The part also provides for the prorogation of the County Assembly, suspension of the county executive committee, establishment and eventual dissolution of an Interim County Management Board on accession of a new government. Part XIV (Sections 129–133) discuss pensions and personal liability, and repeal of the Local Government Act. The final part (XV – Sections 134 – 136) covers transitional considerations, including the first sitting of the County Assembly, facilitation of civic education.
and the continuing status of serving civil servants on the coming into effect of the Act.

6.2.3 Cities, Municipalities and Towns

Prior to the devolved system of government brought about by the 2010 constitution, the cities, municipalities and towns in Kenya were managed by local authorities. The local authorities traced their lineage to the Local Native Councils (LNCs) which were established in 1924. Each LNC had the District Commissioner appointed by the Central Government as its Chairman. The DCs were autocratic administrators who applied strict rules in ensuring compliance with government policies. Many of these policies related to environmental issues such as soil conservation and the preservation of water catchments. The use of forced labour and corporal punishment as means of pursuing compliance with environmental objectives was commonplace. An Ordinance promulgated in 1937 provided for some democracy in governance through the establishment of positions of elected councilors. However, the LNCs continued to have little autonomy and provided only a narrow range of services. Further attempts were made towards devolving greater degree of autonomy to the local councils through the 1950 African District Councils Ordinance. However, the DC retained his position as council Chairman.

With independence, the African District Councils and the European Councils were dissolved and the structure of local government in Kenya unified. However, the Central government retained tight control over local authorities. Indeed, the local authorities became "simply appendages of the central government" (Oyugi 1983:123). The Councils shared the same administrative areas delineated by provincial, district and divisional borders of the provincial administration.

The local authorities retained a considerable degree of leverage as far as environmental management is concerned. They were vested with authority over the trust lands, which straddle much of Kenya’s arid, semi-arid, grassland and woodland areas re-known for their vast biodiversity, especially wildlife. They exercised this jurisdiction by licensing various types of land and resource access
and uses. This includes allocating land to individuals, groups or communities for construction of business enterprises and extraction of timber. Over the years, many local authorities ceded the authority to license timber extraction to the District Commissioners of their respective districts.

Many other local authority responsibilities had very direct implications for environmental management. These include disposal of waste, town and city planning, construction of rural access roads and formulation and enforcement of by-laws. In fact, a large percentage of local authority by-laws are geared towards ensuring clean and healthy environments. They focus, *inter alia*, on issues to do with health and sanitation, waste disposal and destruction of vegetation. These by-laws are legally enforceable in mainstream courts of law. The local authorities also maintained a cadre of *askaris* which were well-known for their rogue manners when enforcing the by-laws or court orders.

Furthermore, such activities as licensing and collection of taxes from businesses by the local authorities also brought forth environmentally beneficial effects. Levying taxes on charcoal and fish sales, for instance, can be disincentives for trade in these products, thereby acting as important disincentives for over-exploitation of these resources. It is unfortunate that the local authorities scarcely ever saw their licensing authority as a means of discouraging wanton use of such resources. Indeed, this function may have worsened the situation in respect of resource use, as it is open to abuse by individuals who can afford the licenses.

Of even greater significance for the environment is the jurisdiction local authorities had over game reserves. They were responsible for managing these reserves for the benefit of the local communities in their areas. Not only did they raise fees for entry into the reserves for tourism purposes, they also licensed businesses to be operated within the reserves. These activities provided important revenues for running local authorities, which had game reserves within their areas of jurisdiction. Indeed, the richer local authorities – like Kajiado County Council – were those with game reserves in the wildlife-rich areas of the country.
With time, it became clear that the wildlife management functions of local authorities needed rethinking, streamlining, and reinforcement. Local authorities were ill-equipped and ill-resourced to deal effectively with the highly technical challenge of managing wildlife. This made most local authorities with game reserves to rely heavily on the Central Government, private enterprises, and KWS in managing the reserves. The result was considerable controversy and wrangles over resource sharing among the central government, businesses, and local communities involved. Little, if any, resources were ploughed back into the management of the reserves and natural resources.

It is worth noting that many district and provincial level local authorities – the municipalities and counties, respectively – maintained directorates of environment or, at least, the position of an environmental officer. The same applied to such environmental issues as physical planning, and health and water services. These officers were responsible for advising the local authorities on environmental implications of activities in the areas where the authorities were responsible. They were also responsible for ensuring that the local authorities protected and enhanced the environment.

The devolved government structure brought about by the 2010 constitution vested most functions of the local authorities on the county governments. Specifically, cities and municipalities are now managed by county governments and administered on their behalf by city or municipality boards. The decisions of the boards are implemented by city or municipality managers (or town administrators in the case of towns). It is worth noting that the Urban areas and cities Act did not remove the by-laws made and the licenses or permits issued by the local authorities established, under the Local Government Act, and

149 Urban Areas and Cities Act No. 13 of 2011. The Act, pursuant to Article 184 of the Constitution, makes provisions for classification, governance and management of urban areas and cities; and for the criteria of establishing urban areas, and for the principle of governance and participation of residents.

150 Section 12, Urban Areas and Cities Act No. 13 of 2011
subsisting or valid immediately before the commencement of the new Act. Such by-laws licenses and permits are deemed to have been given, issued or made by the boards established pursuant to the Urban areas and cities act until their expiry, amendment or repeal.

The city and municipality boards are the overseers of the affairs of the city or municipality, and are charged with a raft of other functions\textsuperscript{151} which also impact on the environment, forests and other natural resources. For instance the boards are required to promote a safe and healthy environment. Also of particular interest to forests and REDD+, the boards are charged with the duty to:

“control land use, land sub-division, land development and zoning by public and private sectors for any purpose, including industry, commerce, markets, shopping and other employment centres, residential areas, recreational areas, parks, entertainment, passenger transport, agriculture, and freight and transit stations within the framework of the spatial and master plans for the city or municipality as may be delegated by the county government”

The boards also develop, adopt, implement and monitor the impact and effectiveness of policies, plans (including integrated development plans), strategies and programmes for their respective counties; as well as implement applicable national and county legislation. The county governments may also delegate to the boards the role of infrastructural and other development and services within the city or municipality. This role may impact on forests and the environment. Additionally, the boards are mandated to enter into contracts, partnerships or joint ventures necessary for the discharge of their functions. It is also the boards’ role to monitor, and where appropriate, regulate city and municipal services where those services are provided by service providers other than the board of the city or municipality. In the case of towns, the functions of the board are performed by a committee appointed by the county governor and approved by the county assembly.

\textsuperscript{151}Section 20, Urban Areas and Cities Act No. 13 of 2011
Other than these roles, the boards of cities and municipalities empowered to *inter alia*, promote constitutional values and principles which include participation of the people, equity, good governance and sustainable development. The boards’ powers also include making by-laws and recommendations for issues to be included in by-laws, and ensuring residents’ participation in all decision making including through citizen fora. Using these powers, the cities and urban areas can participate in ensuring sustainable utilization and management of forests within their jurisdiction.

### 6.3 Local Communities and Non-state Actors

Local communities and non-state actors have a critical role to play in the development of the REDD+ framework. In fact, the Forests Act requires, in mandatory terms, the establishment of forest conservation committees (FCCs) for each forest conservancy area. They are based on forest divisions and stations, advice the Forest Service on local needs, monitor implementation of law and policy, assist local communities achieve equitable benefit sharing, and recommend potential forest areas.

Various institutions can also make significant contributions in policy analysis and research. Others, like the Institute for Law and Environmental Governance (ILEG), can contribute through research and capacity development initiatives linking environmental management, governance and the search for sustainable development in Kenya. Universities and national research institutes can also make important contributions in this regard.

As regards the role of the private sector, its involvement in environmental management has been very minimal, if any, over the years, partly because there has been little appreciation of sustainability principles by business. However,

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152 We use this term as an equivalent of the word “civil society” as applied by the UN. See UNEP. 2002. “Natural Allies: UNEP’s Engagement with Civil Society. Nairobi: UNEP.


154 For more on ILEG’s work, see [www.ilegkenya.org](http://www.ilegkenya.org).
recent developments point to great progress in the right direction. The Kenya Association of Manufacturers (KMA) has recently been involved in implementing a number of sustainable development projects in a wide range of issues, including renewable energy, cleaner production and climate change. In addition, many private enterprises are starting to support environmental projects in response to the vogue corporate responsibility paradigm that is moving up the agenda in the corporate world, boardrooms and shareholders meetings.

7.0 TRADE, INVESTMENT AND FINANCIAL ACCOUNTABILITY

7.1 Trade and investment

As with other types of trade and investments, REDD+ activities will require fiscal incentives, accessible business development procedures and a conducive business environment to attract investors. Kenya’s economy went through a very difficult phase in the 1990s, characterized by low or no growth, and a decline in real per capita incomes between 1980 and 1999. As part of efforts to address the economic decline, the NARC government published the Economic Recovery Strategy for Employment and Wealth Creation (ERS) when it took over in 2003 (Oparanya, 2011). The ERS set the guidelines for economic recovery from 2003 to 2007. Under ERS, Kenya GDP growth rose from 0.6 percent in 2002 to 7.1 percent in 2007. Recovery was felt in a rise in stock market indicators, employment, especially in the informal sector, higher electricity connections in the rural areas, more earning in tourism, rising productivity in agriculture and industry, and poverty reduction.

155 Oparanya, W. A., 2011. Role of the National Economic and Social Council in the implementation of Kenya Vision 2030. A keynote speech by Hon. Wycliffe Ambetsa Oparanya, EGH, MP, Minister for Planning, National Development and Vision 2030, to the United Nations Department of Economic and Social Affairs meeting on managing economic and social councils as a driving force of the national dialogue on economic and social policies, Nairobi, 7 and 8 March 2011

156 Ibid
In order to sustain the momentum of social and economic development brought by the ERS, the Government launched the National Economic and Social Council (NESC) in January 2004.\textsuperscript{157} The NESC’s role was to provide timely, accurate and independent economic and social advice to the government, and to continuously provide a consultative platform that can improve coordination between the Government and the private sector. The specific responsibilities of the Council include the following:

- To create a forum in which government, business and labour unions can identify and discuss policy issues and make recommendations consistent with the development aspirations of the country.
- To appraise the various programmes and activities of the Government in the light of Government policy
- To improve the targeting and addressing of strategic objectives with a focus on the most critical social and economic needs.
- To utilize private-sector and civil society capacities and synergies through collaboration, engagement and networking in order to promote efficiency and effectiveness in economic planning.\textsuperscript{158}

The NESC thus set the stage for improving the business environment and attracting investors. Hon. Wycliffe Oparanya, Kenya’s then Minister for Planning, National Development and Vision 2030, noted that Kenya’s NESC unlike those of other countries had remarkable success. Among other things, the NESC generated the idea of formulating the Vision 2030.\textsuperscript{159}

Kenya Vision 2030\textsuperscript{160} was launched in June 2008. The Vision recognizes the important role of increasing public and private investment in its effort to

\textsuperscript{157}Ibid

\textsuperscript{158}Kenya Private Sector Alliance (KEPSA).\textit{Strategic Plan Document 2010 – 2012}

\textsuperscript{159}Oparanya, 2011 See \textit{supra} note 159

\textsuperscript{160}Government of Kenya, 2007.\textit{Kenya Vision 2030}
transform Kenya into a newly industrializing, middle income country providing a high quality life to all its citizens by the year 2030. According to the Vision, Private sector investments were 15.6% of GDP in 2006/07. This is expected to rise to 22.9% in 2012/13, and to over 24% of GDP during the period 2020/21 to 2030. Foreign direct investment is expected to comprise a significant share of the increase. In order to achieve this level of private investment, it proposes the following interventions:

- Restoration and expansion of the infrastructure stock;
- Upgrading financial services to world class levels;
- Strengthening of capital markets;
- Improving the regulatory and licensing framework to reduce bureaucratic costs;
- Strengthening the judiciary;
- Corruption control;
- Ensuring labour markets operate flexibly enough to reflect the true cost of labour; and,
- Ensuring human resource quality is upgraded to enable human capital to play a larger role in raising productivity.

These interventions are to be underpinned by macro-economic stability, assurance of the rule of law and protection of property rights including intellectual property rights. Vision 2030 therefore provides a very useful framework for promoting REDD+ related investments. The Vision gives special attention to investment in the arid and semi-arid districts, communities with high incidence of poverty, unemployed youth, women, and all vulnerable groups. As mentioned elsewhere in this paper, much of the REDD+ activities are expected to be undertaken in the arid and semi-arid areas. Promoting investments in these areas will therefore clearly give impetus to REDD+ success.
The government of Kenya also launched the Private Sector Development Strategy (PSDS) \(^{161}\) in January 2007 in order to create a conducive business environment for Private Sector growth by alleviating major constraints, and to enhance the growth and competitiveness of the Private Sector. The specific goals of the PSDS are of relevance to a future REDD+ finance mechanism as they can enhance investments in forest plantations and renewable energy technologies. They are:

- Improving Kenya’s general business environment
- Accelerating Public Sector institutional transformation
- Facilitating economic growth through greater trade expansion
- Improving the productivity of enterprises, and
- Supporting entrepreneurship and indigenous enterprise development.

In addition, Parliament enacted the Public Private Partnerships Act\(^ {162}\) to provide for the participation of the private sector in the financing, construction, development, operation, or maintenance of infrastructure or development projects of the government through concession or other contractual arrangements; and the establishment of the institutions to regulate, monitor and supervise the implementation of project agreements on infrastructure or development projects.

The Act established key institutions whose functions are key to promoting investments in REDD+ activities. The Public Private Partnership Committee was established\(^ {163}\) to inter alia, formulate policy guidelines on public private partnerships; ensure that all projects are consistent with the national; approve project proposals; formulate or approve standards, guidelines and procedures for awarding contracts and standardized, bid documents; examine and approve the feasibility study conducted by a contracting authority under the Act; review the legal, institutional and regulatory framework of public private partnerships; and

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\(^{162}\) Act number 15 of 2013

\(^{163}\) Section 4(1), Act Number 15 of 2013
ensure the efficient implementation of any project agreement entered into by contracting authorities.\textsuperscript{164} The committee is chaired by the Principal Secretary for the National Treasury. The committee’s membership also comprises the Principal Secretaries in the ministries of Interior and coordination of national Government; Devolution and Planning; Land, Housing and Urban Development; the Attorney General or a person deputized by him in writing; four non public officers appointed by the Cabinet Secretary for National Treasury; and the Director who shall be the secretary to the Committee.\textsuperscript{165}

The Act also established the public private partnerships unit within the National Treasury to provide secretariat and technical functions to the committee.\textsuperscript{166} The unit comprises a Director; and such staff as the Cabinet Secretary may, in consultation with the Director, consider necessary for the performance of the functions of the unit. The Act also makes provisions for formation of Public private Partnership nodes by contracting authorities that intend to enter into a public private partnership.\textsuperscript{167} The nodes identify, screen and prioritize projects according to the committee’s guidelines; prepare and appraise project agreements; undertake the procurement process; monitor the implementation of a project agreement; liaise with all key stakeholders; and oversee the management of a project; and submit project reports to the unit.

The government of Kenya is taking specific steps to promote investments in green projects and to make Kenya a competitive carbon finance investment destination.\textsuperscript{168} For instance, the Ministry of Finance is in the process of developing a policy on carbon trading to enable the government to harness potential revenue from projects that cut greenhouse gas emissions. The National

\textsuperscript{164} Section 7, Act Number 15 of 2013

\textsuperscript{165} Ibid

\textsuperscript{166} Section 11, Act Number 15 of 2013

\textsuperscript{167} Section 16, Act Number 15 of 2013

Policy on Carbon Finance and Emissions Trading currently in draft form is expected to pave the way for the government to plan incentives to the private sector and encourage investors to engage in green projects. According to the chief economist at the Treasury, Mr. Erastus Wahome, the policy will also facilitate resource mobilization by attracting foreign investments into such projects, allow sustainable growth by guaranteeing stable carbon revenues, and enhance the country’s capacity to adopt carbon finance instruments.\textsuperscript{169}

Private sector institutions also play key roles in promoting trade and investment in Kenya. The Kenya Private Sector Alliance (KEPSA) is the national apex body of the private sector in Kenya incorporated in 2003.\textsuperscript{170} KEPSA’s membership comprises more than 60 Business Membership Organizations and in excess of 180 corporate organizations.\textsuperscript{171} KEPSA’s objective is to create and maintain an enabling business environment through high level advocacy and strategic interventions. Specific objectives include:

- to strengthen the role of private sector as the pillar and engine of economic growth, employment and wealth creation;
- to ensure the formulation and implementation of pro-growth policies that promote Kenya’s competitiveness, encourage domestic and foreign investment, pursue regional, continental and international economic opportunities;
- to promote values of good business ethics and practices, innovation, hard work, goodwill and collective responsibility;
- promote action-based best practices, corporate social responsibility, conservation, protection and prudent use of Kenya’s natural resources;
- ensuring dignified living conditions, quality life, socio-cultural wealth, human development, growth and sustainable development for posterity;


\textsuperscript{170}Kenya Private Sector Alliance (KEPSA).\textit{Strategic Plan Document 2010 – 2012}

\textsuperscript{171}Ibid
• promote, coordinate, monitor and evaluate private sector activities in pursuit of an enabling business environment; and
• facilitate harmonized private sector approaches on cross-sectoral issues.¹⁷²

KEPSA initiated various dialogue platforms through which it engaged with the government. These include the Presidential Private Sector Working Forum (PPSWF), Prime Minister’s Round Table (PMRT), Speaker’s Round Table (SPRT), Ministerial Stakeholder Forums (MSF), Chief Justice Forum and Parliamentary Departmental Committees (PDCs).¹⁷³ KEPSA’s advocacy through these platforms was heavily guided by the business needs and priority issues contained in what became known as the National Business Agenda (NBA).¹⁷⁴ The National Business Agenda (NBA) was developed in 2008 with the Kenya Association of manufacturers (KAM) and implemented through KEPSA. The NBA was developed as a joint platform for the articulation of key concerns of the business sector in Kenya that required urgent action by the government in order to deepen the private sector and enable it to play its key role in wealth and employment creation.

The NBA identified several key issues that hinder growth of the private sector and contribution to Vision2030. They are *inter alia*, adequate physical infrastructure; crime and insecurity; meaningful and less burdensome business regulation; labour market regulations that incentivize creation and expansion of employment; and expanding external trade through improved facilitation and market access. Others are creation of a tax regime and tax administration conducive to business growth; protection of Intellectual Property Rights; and enhanced government/private sector engagement and coordination. The NBA formed the backbone of the private sector engagement with the government, through the Prime Minister’s Round Table meetings and Ministerial Sector

¹⁷²Ibid

¹⁷³Ibid

¹⁷⁴Ibid
Forums from 2008. The pending issues were to be integrated into the Vision 2030 Medium-Term Plan.

The NBA II\textsuperscript{175} was developed through updating the key successes of the NBA I and reviewing the major issues that remained unresolved in NBA I. The NBA II will cover 2013-2018 and will prioritize\textsuperscript{10} thematic issues where the private sector will focus its efforts on. These thematic issues are all of important in creating a conducive environment for investments in REDD+ activities. They are:\textsuperscript{176}

- Improving the Regulatory Environment by addressing the constraints of high tax rates, high costs of access to finance, high labor costs, corruption, insecurity, poor infrastructure and business licensing
- Reduce costs and revenue losses to businesses due to insecurity, by creating a professional and effective police service, increasing private security industry participation in national security, addressing corrupt elements within the criminal justice system and fighting cybercrime
- Improving Governance: build, strengthen and sustain institutions for accountability by addressing delays and high costs at the courts regarding dispute settlements for commercial matters, inadequate investor protection laws and corruption.
- Infrastructure Development: improve physical and social infrastructure by expanding and rehabilitating transport networks and (air) ports, promoting Public-Private Partnerships in energy, increasing housing supply for low- and medium-income markets and promoting integrated urban planning.
- Promotion and Development of Micro, Small and Medium-Sized Enterprises (MSEs)
- Improving Productivity and Competitiveness of the Agricultural Sector

\textsuperscript{175}\textit{Kenya Private Sector Alliance. The Kenya National Business Agenda II 2013-2018}

\textsuperscript{176}Ibid
• Natural Resources Management by inter alia, increasing Kenya’s forest cover, reducing poaching, promoting green energy, increasing access to safe water and ensuring transparent and prudent management of the extractive industry.

• Improving Trade and Investment by promoting export diversification, tackling Non-Tariff Barriers, strengthening engagement with the Diaspora, and attracting strategic investors.

• Re-investing in Human Capital Development: increasing investments in Technical Vocational Education and Training (TVET) and improving linkages between research, education and training institutions and the private sector.

• Promoting a Culture of High Performance by improving the linkages between policy and planning; increasing consultation with the private sector during policy development; and expediting key projects with huge effects on economic growth.

7.2 Financial transparency and accountability

Transparency and accountability of financial systems is very critical to the success of REDD+ as it has a bearing on attracting investors and equitable revenue sharing. Financial transparency and accountability will also ensure that investors earn carbon credits that are commensurate to their specific contributions towards reducing Green House Gas Emissions. It is thus imperative upon any country willing to attract investments in REDD+ activities to address legal and institutional issues such as anti-corruption, multi-jurisdictional information systems and risk sharing or insurance. If these issues are unchecked, financial flows from REDD+ may risk possible misrepresentation, misappropriation and inefficient allocation of resources.177

This is especially so because REDD+ funds will normally follow multiple pathways, involving many different intermediaries and co-mingling with flows

177 Supra note 95
from a range of sources. This raises the possibility of the funds being counted multiple times, resulting in the perceived scale of REDD+ financial flows being greater than actual flows. Furthermore, countries may adopt different definitions for distinguishing between REDD+ financing and official development assistance (ODA), leading to counting the same funding towards both ODA and REDD+. This may also lead to existing flows simply being re-packaged as REDD+ finance. Misappropriation may also take the form of claiming money for projects that do not exist, or over-claiming REDD+ payments.

The following measures are important in order to ensure robust, efficient and accountable procedures for REDD+ financial flows:

1. Improve transparency on commitments and disbursements
2. Improve transparency on decision-making, such as making key documents and reasons for decisions publicly available and opening meetings to observers
3. Improve accountability, such as consulting and involving all actors like civil society organizations, indigenous peoples and local communities in decision-making and financial control of REDD+
4. Improve efficiency, such as establishing a coordination entity within REDD+ recipient countries to define REDD+ needs and match these to donor capabilities, and capacity building specifically on fiduciary safeguards
5. Minimize the risks of misappropriation and poor practice by private sector actors involved in spending REDD+ finance by sharing information regarding blacklisted companies between multilateral and bilateral institutions involved in REDD+, and requesting that any company involved in or benefitting from REDD+ finance be required to publish details of its beneficial ownership.

Misappropriation of public funds and resources has been a persistent problem in Kenya. In the forest sector, this has been manifested in illegal logging and corruption, identified in the past as the most devastating threat to forest law.

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178 Supra note 95
enforcement and governance.\footnote{See supra note 74} This poses a big threat to REDD+ success as it could undermine political will to safeguard important Cancun Agreement requirements for transparency and accountability.

The government of Kenya has promised to strengthen its war on corruption. The Constitution of Kenya established the Ethics and Anti-Corruption Commission (EACC) whose role is to combat corruption and economic crime through education, prevention and law enforcement, and to conduct mediation, conciliation and negotiation.

The Commission boasts of good and positive outcomes. In the 2011/2012 period for example the commission recovered key public assets including land, and recommended several corruption cases for prosecution. It also participated in conjunction with other stakeholders in formulating the Ethics and Anti-Corruption Act, 2011 and the Leadership and Integrity Act, 2012. The Commission also undertook a number of corruption prevention programmes including REDD+ relevant ones such as the ongoing partnership with the lands sector where the lands management information management system was done. Other preventive measures undertaken by the commission are public education and awareness creation; advisory services; promoting standards and best practices; and research on corruption and governance related issues.\footnote{For specific preventive programmes undertaken by the commission in this period, see Ethics and Anti-Corruption commission, 2011. Annual Report 2011/2012}

With respect to guarantees for investors against the risks of reversals, Kenya is a signatory to several international commercial and economic organizations. Some of these organizations offer risk insurance facilities to protect investors from war, strife, disasters, political actions, land expropriation and other disturbances. These include the Multilateral Investment Guarantee Agency (MIGA) of the World Bank, the African Trade Insurance Agency (ATIA), and other bilateral
investment protocols with a number of countries. Those agreements may not provide automatic coverage for REDD+ investors seeking indemnity for possible reversals as investors must contribute their own funds to be insured. However, Kenya’s and other countries contribution to the insurance pool can somewhat lower the costs to investors. It is also important to note that additional risk sharing mechanisms at the domestic, regional or international level specific to climate change, and possibly REDD+, are currently the subject of ongoing UNFCCC negotiations.

8.0 ANALYSIS OF ISSUES

In this section, we analyze the salient issues emerging from forest governance in Kenya with regard to REDD+, and make suggestions on areas/options for legal and policy reform. We revisit the issue of land use laws in relation to sustainable development in Kenya, as well as the convergence/harmony of REDD+ laws and policies. Other issues covered are adequacy of the institutional framework; carbon rights and benefit-sharing in REDD+; transparency and accountability in REDD+ transactions; and continuing legal reforms in the forest sector.

8.1 Land use law and sustainable development in Kenya

The importance of land use for sustainable development is key, and requires the examination of human activities conducted in connection with some form of land use.\(^\text{181}\) Agriculture needs farmland as forestry does forest land. Even activities on the sea, such as fishery and maritime transportation, need land for ports and harbors as well as for anchoring sites. Furthermore, rivers, lakes, and swamps all inevitably use land in a variety of ways. These human activities will usually have a direct effect on the land. However, such activities may also indirectly affect land and areas farther away. For example, the cutting of trees in the upper stream area

of a river will dry up the groundwater in the downstream area or have an adverse
effect on fishery resources around the mouth of the river. This illustrates that
various forms of land use affect the environment both directly and indirectly.

The challenge then becomes balancing environmental conservation imperatives
with the many competing land uses. Setting aside land for forests or biodiversity
conservation means the land remains undeveloped and thus other economic
activities on the land are forgone. In Kenya, land in the parks and reserves is used
mainly for wildlife-based tourism and forest land is used mainly for forestry and
for gathering non-timber forest products. Such land is always under pressure
from other uses, especially agriculture. Despite the stated intention to transform
into a newly industrializing, middle income country by 2030, Kenya’s economy is
still agro-based\textsuperscript{182}. The Agricultural Sector Development Strategy for 2010-2020
reaffirms this fact, by pointing out that “the agricultural sector is not only the
driver of Kenya’s economy but also the means of livelihood for the majority of
Kenyan people”.\textsuperscript{183}

Given the competing land uses, a critical balance is needed to ensure
environmental conservation, economic growth and enhancing the people’s
livelihoods. This brings into focus the principle of sustainable development, a key
concept in development and environmental literature which has emerged starting
from the Brundtland report, Our Common Future.\textsuperscript{184} It requires countries to
approach development in a way that ensures it meets the needs of the present
without compromising the ability of future generations to meet their own needs.

The idea of conservation introduced during colonialism and followed for the most
part by post colonial governments, mainly sought to maintain state coffers and
benefit the powerful individuals. This ‘conservation’ resulted in the stripping of


\textsuperscript{183} Republic of Kenya, \textit{Agricultural Sector Development Strategy: 2010-2020} (Government of Kenya,
\textit{2010}) page xii

\textsuperscript{184} The Report of the World Commission on Environment and Development (WCED), \textit{Our Common
local communities of any powers of management or control of their natural resources leading to alienation of people from conservation.\textsuperscript{185} To date many Kenyans still consider conservation as a less attractive option for land use. However, as pointed out by Hodas (2007)\textsuperscript{186}, there are enormous opportunities in conservation and sustainable management of Kenya’s natural resources such as forests. Although the author refers generally to African countries, the opportunities are very relevant to the Kenyan case. They include enormous capacity to sequester and preserve carbon in forests, agricultural land and pasture and to reduce CO2 emissions by protecting existing forests and other mitigation approaches. Others are a huge untapped potential for renewable energy, and ordinary improvements in fossil fuel efficiency.

In order to successfully exploit these opportunities, there is need to strengthen land use laws and to align them to the imperatives of sustainable development. The new land laws have not properly addressed tenure insecurity especially on community lands which host much of Kenya’s forests. This is coupled with lack of clarity on the holders of carbon rights and potential beneficiaries of forest resources including REDD+ carbon finance. In addition, most land related laws are outdated besides being unclear and incoherent. The institutional framework for managing land and land based resources including forests is weak. These challenges are worsened by lack of a land use policy to guide the critical balance between the many competing land uses. These challenges have led to continued degradation of land and land based resources; frequent land related violence; conflict and duplication of duties among different institutions; and continued marginalization and loss of livelihoods by communities. We analyze each of these issues in more detail below.


8.2 **REDD+ and Land Tenure System in Kenya**

Land tenure is critical to REDD+ in a number of ways. It determines inter alia, the extent to which the legal framework recognizes and protects forest-related tenure including rights to carbon; the extent to which the legal framework recognizes customary and traditional rights of indigenous peoples, local communities and traditional forest users; consistency between formal and informal rights to forest resources; and the extent to which the legal framework provides effective means of resolving disputes by due process. Indeed, the Cancun Agreements, at paragraph 72, requests parties to address inter alia, land tenure issues. The challenge becomes addressing land tenure in a manner that is equitable and secure.

8.2.1 **Key Issues in Equitable and secure land tenure for REDD+ in Kenya**

There are a number of tenure related issues that have implications for the success of REDD+ in Kenya. First, while Constitution categorizes land into Public, Private or Community, the Forest Act 2005 categorizes forests Government gazetted forests, Local Authority forests and Private forests. The forest tenure regime is therefore unclear given that all forests fall on land. The Local authority forests, formerly governed by the Trust Land Act are now presumably Community forests vested in County Governments. However, they still lack legal protection given that the Community Land Law has not been enacted by parliament. In addition, the Land Act which has already been enacted to govern public and private land does not specifically give treatment nor recognize the importance of REDD+.

Secondly, since the colonial period and through successive post colonial governments, policies and laws on land have protected private land rights, at the expense of indigenous or communal land rights. Individual land tenure was introduced in Kenya during the colonial period as the tenure for white settlers. Late in its tenure, the colonial government also initiated a policy of converting
customary land tenure to individual private ownership. The wisdom of this decision was that private tenure was the most suitable tenure regime to ensure agricultural productivity. This policy was continued by successive Kenyan governments.

The individualization of land rights has undermined indigenous culture and conservation systems, and destroyed traditional resource management institutions. This has in effect undermined the role of indigenous people in the management and conservation of forests and other land-based resources. In addition, widespread abuse of trust by the government has undermined effective management of trust lands. For example, county councils, which were the trustees of trust lands, disposed of trust land irregularly and illegally. Despite these issues however, customary land tenure continued to be the most widespread and dominant land tenure system in Kenya.

Both the National Land Policy and the 2010 Constitution provide a critical basis for addressing the long-standing tensions around land tenure and use in Kenya. The Constitution brought fundamental shift in the manner and terms under which the country is to be governed. It seeks to make Kenya an open and democratic society requiring that justice, fairness and the people’s interest prevail in all affairs of the state, including management of natural resources such as forests. In particular, it recognizes the right to a clean and healthy environment as a constitutional right. The constitution incorporates principles of land policy, borrowed from the National Land Policy as follows:

Land in Kenya shall be held, used and managed in a manner that is equitable, efficient, productive and sustainable, and in accordance with the following principles—

(a) equitable access to land;
(b) security of land rights;
(c) sustainable and productive management of land resources;

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187 Article 42 of the Constitution of Kenya 2010
(d) transparent and cost effective administration of land;
(e) sound conservation and protection of ecologically sensitive areas;
(f) elimination of gender discrimination in law, customs and practices related to land and property in land; and
(g) encouragement of communities to settle land disputes through recognized local community initiatives consistent with this Constitution.

On the property institution, the changes brought by the Constitution include vesting the radical title on the people collectively as a nation, as communities and as individuals.\textsuperscript{188} Others are protection of the right of every person to acquire and own property, and formation of a National Land Commission to manage all public land on behalf of the State. The Constitution also brought fundamental shifts in the property regime by replacing the categories of government, trust, and private land with state, community, and private land.\textsuperscript{189}

The National land policy addresses the tenure issues in a number of ways. With regard to community land, the policy recognizes and protects customary land rights, and reasserts its viability.\textsuperscript{190} The policy requires government to document and map existing forms of communal tenure, whether customary or non-customary, and to provide for its recognition and protection as well as restitution of “illegally acquired parts of trust land to the affected communities.” The policy requires community land to be vested in the community. The challenge is that it is not clear whether this refers to both communities of common descent and communities of common residence, or to only the latter. Another challenge is that a good deal of land has been converted to individual ownership, yet are still in practice managed according to a mix of formal and customary rules. In others, there is active conflict between those asserting claims under the old and new

\textsuperscript{188} Article 61 of the Constitution of Kenya 2010

\textsuperscript{189} Article 61(2) of the Constitution of Kenya 2010

\textsuperscript{190} Supra note 25, Section 3.3
systems. In such cases, the policy is not clear whether a roll back of the conversion to individual ownership is anticipated, and the implications of such actions for existing title holders.

The National Land Policy (2007), the Land Act and the Constitution require Parliament to enact legislation to give effect to the constitutional provisions for community land. However, the legislation as required by article 63 of the Constitution is not in place, although there is a Draft Community Land Bill, 2011. The Bill proposes establishment of land administration committees and land administration boards to manage community land. The cabinet Secretary is required by way of a gazette notice to establish land administration areas for purposes of election of committee's members to serve in the land administration committee. The land administration committees allocate customary land rights but are subject to the community land boards, also created by the Cabinet Secretary to *inter alia*, hold and manage community land on behalf of those communities.

For public land, the National Land Policy proposes establishment of an inventory, to be held and managed by the National Land Commission (NLC) in trust for the people of Kenya. There is also a call for repossession of “public land acquired irregularly”. On this regard, questions abound as to what is considered not to be “bonafide.” If this refers to land acquired by fraud or other corrupt practice, and this must be proven in court, it is a perfectly legitimate provision. If, however, it refers to land acquired legally, but as a result of abuse of discretion, including ethnic favoritism, it raises serious questions.

The land Act enacted in 2012\(^\text{191}\) deals in detail with the management and administration of public land, in line with the Constitution and the Land Policy. It requires the National Land Commission to establish a geo-referenced data of all public land, which is to be authenticated by the statutory body responsible for

\(^{191}\text{Land Act No. 6 of 2012}
The Act also makes it mandatory for the commission to share the data with the public and relevant institutions in order to discharge their respective functions and powers under the Act. The Act deals with conversion of land, stating that any land can be converted from one tenure regime to another. Specifically, it states that public land may be converted to private land by alienation, or to community land subject to public needs or in the interest of defense, public safety, public order, public morality, public health, or land use planning. Importantly, the Land Act puts a threshold of parliamentary approval for any substantial transaction involving the conversion of public land to private land. The Act empowers the Commission to prescribe guidelines for the management of public land by all public agencies, statutory bodies and state corporations. The Act deals with allocation of public land. However, it doesn’t provide guidance on repossession of land acquired irregularly prior to its enactment, apart from setting out what is to be excluded from being governed by the law applicable to it immediately prior to the commencement of the Act.

In addition, successive governments in Kenya have been poor stewards of government land and Trust land. For example, the government, even under the past Constitution, had the powers to regulate property rights through compulsory acquisition, or eminent domain and through development control or police powers. However, these powers were largely not applied in the interest of environmental conservation. In many cases they were used to reward organizations or individuals for political or other reasons. In other cases, the government also lacked administrative capacities for effective management land.

192 Ibid at Article 8(a)
193 Ibid at Article 8(c)
194 Ibid at Article 9
195 Ibid at Article 9(3)
196 Ibid at article 10
197 Ibid at Article 12
198 Ibid at Article 162
The Constitution and the Land Policy both envisage reforms in the manner in which the power of the state to regulate land use is to be exercised. Paragraph 42 of the Land Policy adds a new condition that the exercise of these powers should be based on rationalized land use plans and agreed upon public needs established through democratic processes. The National Land Policy also requires at paragraph 47, that the powers of compulsory acquisition be exercised based on criteria, processes and procedures that are accountable, transparent and efficient. It however fails to define such criteria to include ecological imperatives such as conservation and protection of natural resources such as forests. On the state’s police power, the National Land Policy requires, amongst other things for zoning, the establishment of efficient, transparent and accountable standards, procedures and processes. Other important inclusions in these requirements is that local practices and community values on land use and environmental management; and effective public participation are taken into account in the exercise of development control.199

8.2.2 Summary conclusions on Kenya’s land tenure and legal preparedness for REDD+

Secure and equitable land tenure is very critical for addressing the issues under the Cancun Agreements and REDD+ activities, guidance and safeguards. There have been consistent efforts and progress in improving the legal and institutional framework for land tenure in Kenya. However significant challenges remain.

1) There is a challenge with regard to tenure security especially in trust lands and un-alienated government land as no authority holds the title deed for these lands.

The proposed community land bill promises to address this issue by establishing Land administration committees and Community land Boards to hold and manage community land on behalf of those communities. Unless the discussions

199 Supra note 25 at paragraph 51
are finalized and the bill is passed in Parliament, insecurity of tenure over community land will continue to hinder sustainable management and utilization of community land. This has direct implications for Kenya’s REDD+ preparedness as significant amount of forests fall on the community lands. Enacting this legislation will protect the rights of forest dependent communities and facilitate their access, co-management and derivation of benefits from the forests.

2) Some laws regarding tenure are unclear. For instance, while the National Land Policy calls for repossession of “irregularly” acquired public land, existing laws including the Land Act, 2012 do not provide guidance on how to achieve such repossession. Furthermore, there is no clear guidance on what is to be considered “irregularly” acquired land or bonafide ownership of land.

3) Despite much of Kenya’s forest occurring on community land, there is no agreed or clear definition of “community” or of “community land”. It is not clear whether this refers to both communities of common descent and communities of common residence, or to only the latter. Such lack of clarity may hinder sustainable utilization of land and land based resources such as forests. The Constitution anticipates communities to be defined on the basis of ethnicity, culture or community of interest. While culture and ethnicity are intuitive, it is less clear what community of interest means. Yet this might be hold the key to defining communities in a way that promotes national cohesion and co-existence.

4) Many laws and policies relating to land and natural resources such as forests have evident gaps and are incoherent. For instance, the Forest Act is not aligned with the Constitution of Kenya, 2010, the Land Act and the tenure categorization that they have established.

**8.3 Convergence/harmony of REDD+ laws and policies**

Clear and coherent laws and policies are crucial for ensuring cross-sectoral coordination across the different relevant entities, and that in implementing such activities, forest dependent communities are not deprived of human needs, such
as food and energy. Clear and coherent laws and policies are also important for understanding hierarchies in land and natural resource interests, such as mining, easements and acquisitions. Lack of such clear understanding can undermine REDD+ implementation.

### 8.3.1 Key challenges to clarity and coherence of laws and policies for REDD+ in Kenya

The REDD+ programme in Kenya is relatively young. As such, knowledge and information sharing among government departments and agencies, and coordination of laws, policies and institutional mandates across diverse sectors has been minimal. The forest sector cannot implement REDD+ alone. There is a challenge in information sharing and coordination of all the forest related sectors to work together on different goals towards achieving REDD+ success.

There are several statutes that are relevant to the success of REDD+ implementation in Kenya, the major ones being the Forest Policy 2007; Forests Act 2005; EMCA (1999); the National Land Policy; the Energy Policy among others. Most of these statutes have adopted the principle of sustainability in the management of natural resources, and at least to that extent, are in agreement in promoting the success of REDD+ implementation. For example, Vision 2030 provides Kenya’s overall sustainability framework and requires all government departments and agencies to align their development with its objectives. The stated vision of the Land Policy is to guide the country into sustainable and equitable use of land. Among the objectives of the Energy Policy is to address environmental problems and to promote renewable energy technologies. The constitution of Kenya also places sustainable development within the content of national values. The environment and Land Court established pursuant to Article 162 (2) b of the Constitution is also to be guided by the principle of sustainable development.

Despite the broad concept of sustainability, the laws are not completely harmonized as each of them considers relevant environmental issues from
sectoral rather than multi-sectoral and integrated perspective. For example, certain policies and legislations (e.g. the Agriculture Act) tend to focus on economic development and will allow clearance of natural habitats to attain their goals without consideration of environmental issues. This has resulted in clearance of some forests in favour of establishing tourism facilities, roads and agricultural projects.

There are other examples of laws that are inconsistent. Article 14 (l) of the Water Act provides for the gazettement of water catchment areas, most of which are gazetted as forest reserves under the Forests Act. There is thus lack of clarity on who is responsible for certain actions among the lead institutions, in this case the Water Resources Management Authority (WARMA) and KFS. The confusion goes further. The Forests Act 2005 provides for formation of community forest associations (CFAs) at forest station level. Under the Water Act 2002, water catchment committees are formed to manage catchment areas gazetted under the Act. Water Resource Users Associations (WRUAs) are also being formed at local level. Since almost all the water catchment areas are gazetted forest reserves, the area under which WRUAs and CFAs operate overlap.

There also exists potential for conflict between the Forest Act and the Wildlife (Conservation and Management) Act. The double gazettement of forests as forest reserves (under the Forests Act) and national reserves (under the Wildlife Act) may make law enforcement difficult. For example, while the Wildlife Conservation and Management Act prohibits extractive uses of forests, Forests Act permits it under section 46 (2).

The sectoral approach to conservation and development has widely failed to address the cross cutting environmental and conservation issues. The resultant inter-sectoral inconsistencies, duplications and conflicts have contributed to further loss of forests.

The Environmental Management and Coordination Act (EMCA), through the National Environmental Management Authority (NEMA), is mandated to ensure
coordination and harmonization of the many pieces of legislation that govern environmental management including forests. However, this has remained elusive as manifested in the persistent disputes and lack of coherence in implementing the MOU between KWS and the then Forest Department that provided for joint law enforcement.\(^{200}\)

The Revised Draft of the National Environmental Policy recognizes the lack of harmony in the law and policy instruments relating to the environment, and seeks to address the issue. The objectives of the Policy include developing an integrated approach to environmental management, and strengthening the legal and institutional framework for effective coordination and management of the environment and natural resources. Once concluded and adopted, the provisions of this draft policy promises to go a long way in ensuring harmony and coordination of the policies and legislations governing management of the environment and natural resources including forests. The Draft Forest Policy 2007\(^{201}\), also in recognition of the said challenges, proposes establishment of an inter-ministerial committee bringing together forest related sectors. Moreover, it expands the mandate of KFS to be responsible for management of all types of forests, in order to reduce overlaps.

### 8.3.2 Summary conclusions on clarity and coherence of laws and policies for REDD+

Strengthening national governance structures is a key requirement for REDD+ to work for development in any country. In particular, the establishment of clear and coherent laws and policies related to REDD+ are crucial to overcome inhibitive ambiguities and conflicts among REDD+ actors. Despite considerable effort and progress in improving forest governance, Kenya continues to face key challenges in establishing a clear and coherent legal and policy framework for REDD+.

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governance of REDD+ activities. The laws established under several statutes are not completely harmonious as each of them considers the issue from a rather narrowly defined as opposed to a multi-sectoral and integrated perspective. The challenges to clarity and coherence of REDD+ related laws and policies can be summarized as follows:

- The legislation relevant to the management of forests is inscribed under many different sectoral laws, leading to failure to address the cross cutting environmental and conservation issues. The resultant inter-sectoral inconsistencies, duplications and conflicts have contributed to further loss of forests. EMCA, 1999 did not remove the edifice of sectoral environmental institutions created during the colonial era and inherited at independence
- Although EMCA, 1999 has relevant provisions for promoting REDD+, it does not effectively address several REDD+ related issues. These include development of national inventories of anthropogenic emissions of GHG in Kenya by source and removal of GHG by sinks; national framework for carbon finance; and access to environmentally-sound technologies
- The Forests Act, the Water Act and the Wildlife (Conservation and Management) Acts have created overlaps in the jurisdictions of related institutions to manage areas where forests are located
- The National Environment Policy, 2012 has useful provisions to address the lack of clarity and coherence in legal and policy framework for environmental governance. However, it is yet to be adopted as a framework to govern the environment in Kenya.
- The existing laws and policies for forest governance do not clearly show the rules for access and use rights; for sharing of revenues between KFS and other forest sector actors; and legal holders of “carbon rights”

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202 These include provisions for the establishment of air quality standards together with emissions requirements (Part VIII), environmental impact assessment requirements (Part VI), environmental restoration orders and environmental conservation orders (Part IX).
• There is insufficient enabling legislation to give effect to the involvement and participation of non-state actors including forest-dependent rural communities, civil society and the private sector, as required by the Constitution, the Forests Act and the Forest Policy.

### 8.4 Adequacy of the institutional framework

The success of REDD+ implementation will depend to a great extent on strong institutions with clear mandates and sufficient capacity to govern REDD+ activities. The key institutions dealing with forestry in Kenya include the newly created Ministry of Environment, Water and Natural resources, Kenya Forest service (KFS), Kenya Wildlife Service (KWS), Kenya Forestry research Institute (KEFRI), National Museums of Kenya (NMK), county governments and education institutions. Others are the Non-State Actors including Non-Governmental Organizations (NGOs), professional associations and the private sector. The Forests Act 2005 also established other institutions that include Forest Conservation Committees (FCCs) and Community Forest Associations (CFAs). Others are the institutions proposed under the climate change response strategy (NCCRS) to specifically manage the REDD+ readiness and implementation process. They are the Climate Change Secretariat (CCS), the National REDD+ Steering Committee, the Technical Working Group (TWG), the National REDD+ Coordinating Office (NRCO) and the REDD+ Component Task Forces and Local Conservancy Officers.203

The stability of these institutions in order for them to operate and function effectively and deliver their mandates is very important in sustainable forest management (SFM) and consequently, the success of REDD+ implementation. The Program on Forests (PROFOR) of the Food and Agriculture Organization of

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the United Nations (FAO) (2011) provide the following indicators for examining the adequacy institutional frameworks for forest governance:

- Extent to which the forest-related mandates of national agencies are clear and mutually supportive
- Extent to which the forest-related mandates of national and sub-national governments are clear and mutually supportive
- Adequacy, predictability and stability of forest agency budgets and organizational resources
- Availability and adequacy of information, technology, tools and organizational resources for the pursuit of agency mandates

Against these indicators, and despite the existence of many institutions involved in forest governance in Kenya, there remain key institutional challenges which hinder effective forest governance and success of REDD+ implementation. These are discussed below.

### 8.4.1 Key issues and challenges in adequacy of institutional framework for REDD+ in Kenya

The first challenge relate to the clarity and mutual supportiveness of national agencies involved in forest governance. By virtue of Section 9 of EMCA, the role of NEMA is to exercise general supervision and co-ordination over all matters relating to the environment. As such, NEMA is not an implementing institution, but must perform its role through co-operation with other institutions. Under the various sectoral policies and legislation, there are lead agencies coordinated by

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205 These indicators are not specific to any country, but can be used to view and analyze the institutional framework for the governance of Kenya’s forests and forest resources

206 These have been discussed in Chapter 6 of this Paper under Forest Governance Institutions
NEMA for purposes of addressing environmental issues. However, over the years, some sectoral ministries have complained that NEMA has been encroaching on their sectoral mandates. On its part, NEMA has justified such interventions on the ground that some lead agencies are not performing their role properly, and that NEMA must prod them to ensure diligent implementation of the environmental law.

Lack of clarity in mandates of national agencies has also been manifested between some of the lead agencies. A case in point are the disputes and lack of coherence that arose from the MOU between KWS and the then Forest Department. With KFS expected to take a more aggressive approach to the management of forests, and the need to levy charges for environmental services, the level of conflict can be expected to intensify, particularly with the Ministry of Water and KWS. Under Article 4 (I) of the Forest Act 2005, KFS is charged with the duty to collaborate with other organizations and communities in the management and conservation of forests. KFS can use this provision to be proactive in identifying issues of conflict and calling on NEMA to coordinate and facilitate conflict resolution. In addition the relationship between KFS, NEMA and National Land Commission will require further clarification and harmonization so as to enhance clarity, coordination and efficiency.

There have also been challenges relating to the second indicator – clarity of the forest-related mandates of national and sub-national governments. As discussed, even before the establishment of the county governments, the local authorities had considerable mandate over the management of environmental resources. Although there have been considerable cooperation between the national government and the local authorities, there have been cases of disagreements. A good example, discussed earlier is the case where local authorities, relying on the

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Central Government and other entities for management of game reserves, have felt short-changed with regard to resource sharing, leading to wrangles and controversy.

Potential conflict with national government also arises from the powers given to the boards of cities and municipalities under the Urban areas and Cities act.208 The boards of cities and municipalities are empowered to make by-laws or recommendations of what are to be included in by-laws. Besides, the by-laws made by the former local authorities such as those used to control cutting of timber, destruction of trees and shrubs and afforestation, and to take measures necessary to control bush fires e.t.c., are effective under the Urban areas and cities Act until their expiry, amendment or repeal. It is worth noting that certain sectoral laws also empower relevant ministers to make regulations for the implementation of such laws. Such regulations may affect or even conflict the cities and municipal boards’ regulations including those relating to forests management. They include regulations under the Agriculture Act and the Physical Planning Act.

The devolved government structure established under the 2010 Constitution of Kenya, promises to address some of these overlap issues. While the Constitution, at Article 6(2) reiterates that governments at the national and county levels are distinct and inter-dependent, it promotes cohesiveness and cooperation. It obligates the two levels of government to assist, support and consult and to liaise between each other in order to exchange information, coordinate policies, administration and enhance capacity. Article 189 (2) extends the requirement of cooperation to cover both levels of government, and different governments at the county level in performance of functions and exercise of powers, including setting up joint committees, and authorities. Pursuant to this article, the Intergovernmental Relations Act of 2012 proposes to set out coordination forums, and committees that bring together different county governments, as

208Urban Areas and Cities Act, Act Number 13 of 2011
well as different administrative levels within a county, in order to enhance cooperation.

The other two indicators relate to the adequacy of funding, organizational resources, information, technology and tools for the pursuit of institutional mandates. The issue of adequate funding and other organizational resources for forest management and development has been very prominent in Kenya, particularly in the law enforcement institutions such as KFS and KWS. In the past, forestry activities in Kenya have mainly been funded by the central Government and development partners. While the major central government share to the forestry sector goes to MFW and KFS, the government also provides financial support to other forest related institutions. In addition to central government budget, donors provide additional funding to the forest governance institutions like KFS, KWS, KEFRI, NMK, NGOs and universities. Other sources of income include revenues and interest income.

However, the funding to the forest sector has been inadequate as stated in the Draft Forest Policy 2007. In KFS for example, the government contributed Ksh2.1 billion while Ksh0.71 billion was contributed by development partners in the financial year 2010/2011. Inadequate funding has limited the number of forest guards and other staff and the level of training of available staff. Limited funding has also contributed to low wages and poor equipment leading to low morale amongst the forest guards and other law enforcement staff. Although KFS has continuously improved its revenue generation capacity since its inception, it has neither reached its capacity nor is the revenue generated sufficient for its activities.

Low funding of the forest sector by the government can partly be attributed to non inclusion of the total value of forest products and services and inadequate

209 See supra note 75


211 Supra note 94
data on forestry contribution to gross domestic product (GDP). The forestry sector in Kenya contributes significantly more benefit to the economy than is reported through the Kenya National Bureau of Statistics (KNBS)’s conventional system of National Accounts (SNA) of the United Nations (UN).\textsuperscript{212} The SNA system does not adequately include or represent the natural capital stocks and flows. The omitted contributions of the forest sector arise from the value addition to forest products through the manufacturing sector; the provisions of goods (timber and no-timber) to the subsistence economy (also referred to as the non-monetary economy); the supply of cultural services; and the supply of a set of ecosystem services that regulate ecological processes. In response to this omission, the United Nations developed the System of Integrated Environmental and Economic Account (SEEA), which extends the asset boundary of the SNA to include all natural resources in the economy. However Kenya has not implemented the SEEA.

Forestry management has also been plagued by inadequate research and education, as reaffirmed by the Forest Policy 2007. The policy acknowledges that the “current institutional linkage between forestry research, education, administration, resource owners and users is weak”.\textsuperscript{213} For example, low knowledge on forest legislation on the part of prosecutors, has hindered litigation of forests related cases. Article 4 (f) of the Forest Act\textsuperscript{214} gives reference to research as part of the role of KFS. However, this role has not been pursued aggressively.

Information failure is another key factor that has contributed to ineffectiveness of the forest governance institutions. Availability of sufficient data and information


\textsuperscript{213}Ibid

\textsuperscript{214}Supra note 68
would allow for timely preparation of the requisite management plans. Information failures in forest governance institutions relate for example, to lack of updated national inventories on forest areas, growth and yield; lack of established criteria and indicators for effective forest governance evaluation; and even simple things as the definition of “all types of forests” for clear understanding of mandates.

Other institutional issues in forest governance concern the involvement of Non-State Actors. It is common knowledge that some Non-Governmental Organizations (NGOs), professional associations and the private sector have in-depth experience in forest-related matters. Their experiences have however not been fully utilized to enhance forest governance, due to lack of proper enabling mechanisms. This can also be said of local communities and community forest associations, which in most cases lack financial capacity to execute their mandates.

**8.4.2 Summary conclusions on adequacy of the institutional framework for governance of REDD+ activities**

The challenges in the institutional arrangement for forest governance in Kenya can be summarized as follows:

- There is low funding to KFS and other forest sector public institutions, caused partly by undervaluation of the forest sector contribution to the GDP. This has made most Kenyan forest sector institutions to depend on donor funding, especially regarding the development budget. This presents a significant risk given that donor funding is usually project activity based and short term.
- There is insufficient resource and human capacity in forest governance institutions leading to weaknesses in law enforcement.

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215 See supra note 74

216 Ibid
• There is inadequate synergy between the national agencies (including NEMA, KWS, KFS and Ministry of Water) in providing support to the forestry sector, due to lack of clarity and coherence in their roles.

• The constitution proposes establishment of coordination forums, and committees between different county governments, as well as different administrative levels within a county. This should be fast-tracked to avoid potential conflict between the national government and county governments over utilization and management of forest.

• The forest sector management is hindered by weak institutional linkages between forestry research, education, administration and resource owners.

• There is lack of sufficient data and information relating to updated national inventories on forest areas, growth and yield; established criteria and indicators for effective forest governance evaluation; and a commonly agreed definition of forests.

• The local level forest governance institutions (CFAs and FCCs) are still weak both in terms of financial capacity and ability to influence policy decisions regarding forest governance.

• There is need to focus on devolving the structures of KFS to correspond to the county structure that has been operationalised under the Constitution of Kenya, 2010.

• The linkages between the National Land Commission and KFS requires clarity so as to harmonize responsibility for forest governance and implications of land management for that governance.

8.5 Carbon rights and benefit-sharing in REDD+

8.5.1 Ensuring success of REDD+ implementation through equitable benefit sharing system

For REDD+ to achieve the desired results, it is imperative that mechanisms for equitable benefit sharing are put in place. Equitable benefit sharing will ensure not only sustained emissions reductions, but also realize substantial benefits to the forest communities and avoid making vulnerable people worse off.
In the context of REDD+, benefit sharing refers to how financial incentives transferred from international funds or carbon markets are shared between actors within a country.\textsuperscript{217} Benefit sharing has been highlighted as a key aspect of the processes of REDD+ readiness and implementation. For example, most of the submitted Readiness Preparation Proposals (R-PPs) under the World Bank’s Forest Carbon Partnership Facility and the National Program Documents (NPDs) under the UN-REDD program make reference to the importance of developing benefit sharing systems.\textsuperscript{218} Some also make commitments to transparent and equitable benefit sharing.\textsuperscript{219}

Beyond the understanding that potentially large financial benefits of REDD+ will need to be distributed across the wide range of stakeholders, there are other clear rationale\textsuperscript{220} for benefit sharing in REDD+. First, all stakeholders are potential beneficiaries of a benefit sharing mechanisms. For affected communities, it allows them to become partners in projects and potentially empowers them in decisions that affect them. For the government, benefit sharing is a practical policy tool to achieve greater social inclusiveness and balance social, economic and environmental factors in planning, design, implementation and operation of REDD+ projects. From an investor perspective, benefit sharing could help to reduce risks associated with the project such as non-permanence. Secondly, equitable and collaborative benefit sharing in REDD+ could help to enhance sustainability by turning conflicts over natural resources into consensus. In this


\textsuperscript{218}Peskett, L. 2011. Benefit Sharing in REDD+. Exploring the implications for Poor and Vulnerable People. World Bank and REDD-net


context, benefit sharing encourages local level stewardship of natural resources and leads to decreased pressure on forest ecosystems. Thirdly, clear benefit sharing arrangements in REDD+ could help to address past weaknesses in financial management linked to forests and increase trust.

For REDD+ benefits to be shared equitably, questions abound as to who should enjoy the REDD+ benefits, or who holds the carbon rights. There is no agreed definition of “carbon rights” in academic literature to date. Darryl (2012) defined carbon rights as the “legal right to benefit from reduced carbon dioxide emissions and/or increased carbon dioxide sequestration”, and REDD+ benefit as “any financial or non-financial benefit generated as a result of a REDD+ activity”.

The definition of “carbon rights” adopted in each country should respect the rights of local populations, as well as provide mechanisms for these populations to receive benefits. It is important to note that REDD+ effectively creates a new value for carbon removed from the atmosphere by, and stored in forests. Carbon rights are therefore linked to the property rights over land and forests in which the carbon is stored, or use and management rights related to forests. However, the right to own or manage a forest does not necessarily confer a right to benefit from it. For example REDD+ rules will include social safeguards such as respect for the knowledge and rights of indigenous peoples, and may also promote other policy objectives e.g. respect for human rights and democracy. Unless there are effective management mechanisms and land tenure systems, financial mechanisms such as REDD+ may be susceptible to unfair practices and inequitable distribution. Therefore, for a country to benefit from REDD+, the


222 Ibid

223 For the Cancun Agreements guidance and Safeguards, read Appendix I to the Cancun Agreements (Decision 1/CP.16). See Supra note 1
national laws and policies should be aligned to the requirements of the REDD+ mechanism that is ultimately adopted. In addition, the laws should establish clearly who has the legal rights to carbon.

The Cancun Agreements do not impose on policy makers how to allocate rights to benefits from REDD+. Instead, each country needs to agree within itself on its strategies for allocation of these rights. However, because the REDD+ regime will measure net emissions on a large scale (national and sub-national level), it will require allocation of the rights among a wider set of actors including governments, communities and other entities participating in the shared effort. It is important though, that a significant share of REDD+ benefits go to the actors who actually make decisions on forest use. Often these are the communities who live in or near the forest, and who have the right to benefits from the forest resources. Such communities are in the best position to protect the forest or use it sustainably. As such, recognizing them is the best way to ensure both forest protection and equitable benefit sharing (Knox et al., 2010).224

8.5.2 Key issues and challenges in REDD+ and equitable benefit sharing system in Kenya

Kenya has not yet agreed in express terms on the strategies for sharing REDD+ benefits, although some of the recent laws and policies refer to some potential beneficiaries. The National Climate Change Response Strategy published in 2010225, proposes giving financial incentives to forest-dependent rural communities under a REDD+ mechanism as a way of encouraging sustainable use of forest resources. In order to achieve this, it further proposes the involvement and defined roles of such rural communities in forest management. The Draft Forest Policy of 2007 seems to identify KFS as one of the potential beneficiaries of REDD+ benefits as it identifies the carbon market as one of the


tools that KFS will use to expand its funding base.\textsuperscript{226} Although the Draft Forest Policy recognizes the role of other actors in forest conservation and management, it does not detail how REDD+ benefits will be shared with and among these actors. It only proposes government support for the non-state actors and local communities to undertake forest-related development activities.\textsuperscript{227}

Access to benefits under REDD+ is governed by many different factors including (Peskett, 2011) land tenure; interpretation of carbon rights; revenue sharing agreements and mechanisms; socio-economic criteria; and emissions reductions/removals requirements.\textsuperscript{228} Land tenure is probably the main and most important factor in REDD+ benefit sharing as it determines who has the rights to carry out activities on specific areas of land and to claim benefits from these activities. As discussed, three tenure regimes exist in Kenya as public, community and private. In line with these provisions, there are three forest tenure systems in Kenya: Government gazetted forests which fall under public land, community forests which fall under community land and private forests. There have been long standing tensions over land tenure in Kenya, particularly with regard to trust land forests. Access to subsistence resources in trust land forests was often prohibited, resulting in conflicts between communities and forest authorities.

Kenya’s new forest governance arrangements\textsuperscript{229} recognize and reassert the viability of all three tenure regimes including community tenure. However, the delay in enacting enabling legislation and mechanisms has hindered the local communities’ role in management and access to benefits in community forests. Unless such legislations and mechanisms are in place, the laws and policies may

\textsuperscript{226} Read Policy statement 3.3.5 of Draft Forests Policy

\textsuperscript{227} Ibid

\textsuperscript{228} These may vary depending on a country’s approach to REDD+

\textsuperscript{229} These include the 2010 Constitution, the National Land Policy, the Forest Act, and the Forests Policy 2007
not reflect realities on the ground including the roles and potential benefits of various actors. For example, despite the distinct tenure regimes in Kenya, a good deal of land is still in practice managed according to a mix of formal and customary rules. In others, there is active conflict between those asserting claims under the old and new systems. Such complex tenurial systems may make it particularly difficult to identify beneficiaries and establish benefit sharing systems.

As another example, the Forest Act introduced the establishment of Community Forest Associations (CFAs) to manage community forests areas allocated by KFS. However few CFAs have been set up to date, and even the existing ones lack sufficient training and financial capacity to operate effectively. This may hinder equitable REDD+ benefit sharing especially with regard to forest communities. In addition, the private sector has increasingly become important in the forest sector in the recent past. Other than establishing commercial plantations, a number of private companies have expressed interest in taking concessions on state plantations as provided for in the 2005 Forests Act. However, to date, no concession arrangements have been agreed and the regulations governing the same have not been finalized.

The allocation of financial benefits from REDD+ will not necessarily be linked to land tenure alone (Peskett, 2011) as the right to own or manage a forest does not necessarily confer a right to benefit from it. It is possible that in some countries carbon rights belong to government even if land and forest ownership lie with communities. This means that communities will not benefit unless effective benefit sharing mechanisms are in place. In other cases, emissions reductions will result from broad policy reforms rather than from interventions in specific locations involving a limited set of actors. Again, this requires consultations and agreements on benefit sharing modalities among the many actors. According to Kenya’s R-PP\textsuperscript{230}, discussions on benefit sharing arrangements between KFS, 

communities and the private sector are underway. The potential benefits to be shared include access to firewood and other forest resources and participation in tangy system planting in plantations. In some few cases, KFS has offloaded all carbon rights to communities who have invested in management and conservation of specific forest blocks. The process of consultations on benefit sharing between KFS and other actors is however generally slow and this is likely to slow down the REDD+ process.

The interpretation of carbon rights is another key factor in benefit sharing as it will influence which actors are eligible for financial benefits. REDD+ effectively creates a new value for carbon removed from the atmosphere by, and stored in forests. Carbon rights are therefore linked to the property rights over land and forests in which the carbon is stored, or use and management rights related to forests. As discussed, the right to own or manage a forest does not necessarily confer a right to benefit from it. Lack of clear definition and allocation of carbon rights may hinder especially non-state actors from engaging in REDD+ activities. In particular, the poorer or more vulnerable individuals and groups are less likely to participate in REDD+ and receive direct financial benefits. Typically these include the landless, forest dependent people, women, the elderly as well as the indigenous peoples and ethnic minorities. These actors often lack assets, have fewer rights or are less able to influence how benefits from REDD+ are distributed.

Kenya has not yet established a clear definition and allocation strategies for carbon rights, although it is listed in the R-PP as a priority issue. As one of the priorities during the implementation phase, the R-PP lists *inter alia*, defining a clear set of procedures and rules for carrying out carbon credit generating activities and establishing transparent rules on the allocation of carbon rights.23¹ Such clear rules will lessen risks for non-state actors and especially vulnerable

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23¹ *Ibid*
people to engage in REDD+, and help build the necessary infrastructure for managing national REDD+ activities in future.

### 8.6 Legal, policy and institutional barriers to REDD+ implementation

Kenya is committed to the REDD+ readiness process and is participating actively in international REDD+ negotiations. As a result, it already has a REDD Readiness Plan that outlines the process by which it will develop its national strategy for participating in an evolving international REDD+ mechanism. Despite the progress and effort, there remain key legal and policy barriers to REDD+ implementation in Kenya. Key among the challenges is the lack of a specific policy goal or national strategy for REDD+ readiness process and implementation. Such a policy goal or action plan would provide the framework for effectively addressing REDD+ related issues such as development of national inventories of anthropogenic emissions of GHG in Kenya by source and removal of GHG by sinks; national framework for carbon finance; and access to environmentally-sound technologies.

Secondly, despite the ongoing land reforms, there still exists insecurity and unreliability of tenure especially in relation to community land. The proposed community land bill which promises to address the issue is yet to be finalized. The discussions should be finalized and the bill enacted in Parliament in order to ensure insecurity of tenure does not hinder sustainable management and utilization of community land. This has direct implications for Kenya’s REDD+ preparedness as significant amount of forests fall on the community lands. Also closely linked to tenure is the lack of clarity on some laws regarding tenure. This includes clarities in the *bona fide* ownership of land under the different tenure regimes, or for example the criteria for defining “communities” in relation to ownership of community land. Still on land tenure, the Forest Act is not in line with the Constitution of Kenya, 2010, the Land Act and the related tenure categorization.
Thirdly, the laws that relevant for forest governance and thus REDD+ are established under several statutes. The laws despite embracing the broad concept of sustainability are not completely coherent and often lead to overlaps, duplications and conflicts with one another. The Draft National Environment Policy, 2012 has useful provisions to address the lack of clarity and coherence in legal and policy framework for environmental governance. However, it is yet to be adopted as a framework to govern the environment sector in Kenya.

Fourth, despite an array of institutions charged with forest governance, there are many institutional challenges that if unchecked, will hinder REDD+ implementation. For instance there has been considerable lack of mutual supportiveness and cooperation among national institutions charged with forest governance. This is partly a result of the lack of clarity and coherence of the laws that created these institutions. With the entry of devolved government structure, such conflicts are also expected between the two levels of government as well as between county governments. Another long standing institutional challenge for forest governance in Kenya is availability of adequate funding and the pursuit of institutional mandates. Low funding has made the forest sector to rely heavily on donor funding which is traditionally unreliable because it is project activity based and short term.

The other challenge relates to carbon rights and benefit distribution system. Kenya has not as yet agreed in express terms on the strategies for sharing REDD+ benefits. This stems in part to the lack of a policy goal or national REDD+ strategy. In addition, lack of legislation for managing community land will continue to hinder their participation in and potential benefits from the forests. A good starting point for addressing the carbon rights and benefit distribution is to interpret and define carbon rights in the Kenyan context as this will influence which actors are eligible for financial benefits.

232 For example the Forest Act, 2005 created the KFS while the Water Act created WARMA. There is potential for conflict over management of forests gazetted both as water catchment areas under the Water Act and as forest reserves under the Forest Act.
8.7 Recommendations for continuing legal reforms

- Forest governance in Kenya has seen considerable efforts and progress in the past years. However there are still some remaining challenges and actions needed, especially with the emergence REDD+ mechanisms. There is need to fast track revision of Forest Policy to establish a clear direction for continued forest sector reforms. The Forest Act should also be revised in line with the new Constitution, and to give effect to the Forest Policy. The National Environment Policy should also be finalized and adopted. The recommended areas for action in the legal, policy and institutional framework to ensure REDD+ success are: Advocate and mobilize for inclusion of specific provisions on REDD+ in the relevant laws and policies starting with the ones that are currently under review e.g. the Forest Act, Forest Policy, National environment Policy. In the long term, there should be put in place specific legislation to govern REDD+ implementation in Kenya.

- Provide legislative framework for public participation and involvement of non-state actors including forest-dependent rural communities, civil society and the private sector, in the management of forests and other natural resources

- Clarify the roles and mandates of all the forest sector institutions in order to avoid overlaps and incoherence. For instance, the laws should define the extent to which Kenya Forest Service (KFS) have a role in management of forests that fall on community land, and the role of the National land commission in promoting forest conservation. Indeed, the establishment of the Ministry of Environment, Water and Natural Resources provides an important opportunity for rationalizing institutional responsibilities and addressing lack of clarity on roles. With regard to management of natural resources at the local level, the associations formed in respect of forests (CFAs) and water (WRUAs) could be merged in order to avoid duplicity, turf wars and neglect.

- Rules for access and use rights, and for sharing of revenues between KFS and other forest sector actors like community associations and county
governments. The laws should clearly define who has legal rights to REDD+ benefits that is now commonly referred to as “carbon rights”.

- Rules for establishing and implementing Forest Management Agreements between KFS and other sector actors
- Enabling a mechanism of establishing forest data base and information sharing including an updated national forests inventory
- Establishing a definition of forests for Kenya through a participatory process
- Defining a Kenyan Criteria and Indicators (C&I) for sustainable forest management
- Legislation on Community Land should be finalized and enacted in parliament. The legislation should clearly define “community” and “community land”. For instance the meaning of “community of interest” anticipated in the Constitution should be clarified and defined in a way that promotes inter-ethnic cohesion. Additionally, the Community Land Law should allow customary right holders of land to engage in REDD+ processes, and protect their rights to carbon benefits sharing. The law should repeal or recommend review of the Trust Land Act. It should also recognize the resilience of customary tenure, and of the role customary tenure can play in protection and conservation of forests.

9.0 CONCLUSION
The purpose of this report was to review and analyze Kenya’s preparedness with respect to legal, policy and institutional aspects of the Cancun Agreements and REDD+ activities, guidance and safeguards as it begins to implement the evolving international REDD+ mechanism. It identified key gaps, barriers, challenges and opportunities for REDD+ design and implementation in the existing policy, legal, institutional and regulatory framework. The review and analysis in this report, while based on the Cancun Agreements, also drew from a wealth of authoritative sources, including the UN-REDD Programme, FAO and Profor. It is hoped that this report will help to shed light on the challenges and
opportunities that policy-makers face, with a view to facilitate REDD+ implementation.

Part 1 provided a brief introduction placing the international REDD+ mechanism in the Kenyan context. Part 2 examined Kenya’s governance framework with regard to sustainable development including the historical antecedents, post-independence environmental governance, international commitments and recent constitutional and legal developments. The 2010 Constitution created two levels of government i.e. national and county governments. Any REDD+ mechanism will need to respond to the requirements of the National Government, which is charged with implementing national policies, as well as the County governments which are responsible for the management of county resources. Part 3 examined the land tenure regime in Kenya and its implications for forest governance.

Parts 4-6 reviewed the existing policy, legal and institutional framework for forest governance in Kenya. The laws were reviewed in issue areas, including climate change; land use, ownership and management; forestry; integrated environmental management; and energy. The review established that there exists a wide array of policies, laws and institutions in Kenya that relate to REDD+ design and implementation. Coordination across national and county government actors, as well as civil society, and the private sector is therefore necessary in order to enhance the success of REDD+ implementation. Part 7 examined the trade and investment climate in Kenya including transparency and accountability in REDD+ transactions.

In part 8, the salient issues emerging from forest governance in Kenya with regard to REDD+ were analyzed, and suggestions on areas/options for legal and policy reform were suggested. Kenya does not yet have a stand-alone REDD+ policy or strategy. This report has recommended that provisions for REDD+ be included in the laws and policies currently under review, and that in the long term, legislation on REDD+ be put in place.
Part 8 also highlighted challenges to legal preparedness for REDD+ in Kenya, focusing on the ones that are most pertinent to the Cancun Agreements. Although specific challenges were raised throughout the Country Synthesis report, the following four were analyzed in-depth based on the review of laws, policies and institutions in Parts 4-6: land use law and sustainable development particularly with regard to equitable and secure land tenure; clarity and coherence of laws and policies related to REDD+; adequacy of the institutional framework for forest governance; and carbon rights and benefit sharing in REDD+. The part also distilled the legal and policy barriers to REDD+ implementation in Kenya, and concluded by giving recommendations to be considered in the ongoing legal and institutional reforms.