



Chambers Global Practice Guides

Definitive global law guides offering
comparative analysis from top-ranked lawyers

Environmental Law 2021

Kenya: Law & Practice
and
Kenya: Trends & Developments

Clarice Wambua and Esther Kimanzi
Cliffe Dekker Hofmeyr

practiceguides.chambers.com

Law and Practice

Contributed by:

Clarice Wambua and Esther Kimanzi

Cliffe Dekker Hofmeyr see p.16



CONTENTS

1. Regulatory Framework	p.3	10. Contractual Agreements	p.10
1.1 Key Environmental Protection Policies, Principles and Laws	p.3	10.1 Transferring or Apportioning Liability	p.10
2. Enforcement	p.4	10.2 Environmental Insurance	p.10
2.1 Key Regulatory Authorities	p.4	11. Contaminated Land	p.10
3. Environmental Incidents and Permits	p.4	11.1 Key Laws Governing Contaminated Land	p.10
3.1 Investigative and Access Points	p.4	12. Climate Change and Emissions Trading	p.11
3.2 Environmental Permits	p.5	12.1 Key Policies, Principles and Laws	p.11
4. Environmental Liability	p.6	12.2 Targets to Reduce Greenhouse Gas Emissions	p.11
4.1 Key Types of Liability	p.6	13. Asbestos	p.11
5. Environmental Incidents and Damage	p.6	13.1 Key Policies, Principles and Laws Relating to Asbestos	p.11
5.1 Liability for Historical Environmental Incidents or Damage	p.6	14. Waste	p.12
5.2 Types of Liability and Key Defences	p.7	14.1 Key Laws and Regulatory Controls	p.12
6. Corporate Liability	p.8	14.2 Retention of Environmental Liability	p.12
6.1 Liability for Environmental Damage or Breaches of Environmental Law	p.8	14.3 Requirements to Design, Take Back, Recover, Recycle or Dispose of Goods	p.13
6.2 Shareholder or Parent Company Liability	p.8	15. Environmental Disclosure and Information	p.13
7. Personal Liability	p.8	15.1 Self-Reporting Requirements	p.13
7.1 Directors and Other Officers	p.8	15.2 Public Environmental Information	p.14
7.2 Insuring against Liability	p.8	15.3 Corporate Disclosure Requirement	p.14
8. Lender Liability	p.8	16. Transactions	p.14
8.1 Financial Institutions/Lender Liability	p.8	16.1 Environmental Due Diligence	p.14
8.2 Lender Protection	p.9	16.2 Disclosure of Environmental Information	p.14
9. Civil Liability	p.9	17. Taxes	p.15
9.1 Civil Claims	p.9	17.1 Green Taxes	p.15
9.2 Exemplary or Punitive Damages	p.9		
9.3 Class or Group Actions	p.9		
9.4 Landmark Cases	p.9		

1. REGULATORY FRAMEWORK

1.1 Key Environmental Protection Policies, Principles and Laws

Environmental protection in Kenya is governed by a myriad of policies and laws. The key ones include those listed below.

The Constitution

Kenya has what can be described as a “green” Constitution, as it provides a strong basis for environmental protection in the country. Promulgated in 2010, the Constitution guarantees the right to a clean and healthy environment for all and places the responsibility to protect the environment on the state as well as on all persons.

In addition, the Constitution allows any person who alleges that a right to a clean and healthy environment is being or is likely to be denied, violated, infringed, or threatened, to apply to court for redress as well as pursue any other legal remedies available.

The Constitution also highlights principles such as sustainable development, participation of the people, equity, equality, and the rule of law as among the national values and principles which bind all state organs, state officers, public officers and all persons involved in law and policy-making, interpretation and implementation.

Treaties and conventions ratified by Kenya are recognised under the Constitution as forming part of Kenyan law. As such, key multilateral environmental agreements that have been ratified by Kenya form part of the nation’s environmental protection regime.

The Framework Environmental Law

The Environmental Management and Coordination Act (EMCA), 1999, is the main law on environmental management and conservation.

EMCA establishes key environmental institutions, which are discussed in greater detail in **2.1 Key Regulatory Authorities**. The Act provides for environmental protection through a variety of tools including:

- environmental impact assessment;
- environmental audit and monitoring; and
- environmental restoration orders, conservation orders and easements.

EMCA also highlights the significance of environmental principles in Kenya’s environmental protection regime. The Act asserts that in exercising its jurisdiction, the Environment and Land Court is to be guided by certain sustainable development principles which include public participation, the precautionary principle, the polluter-pays principle, the principle of international co-operation, and the principles of inter-generational and intragenerational equity.

Other Laws and Policies

There are also other sector-specific statutes with regulations that govern environmental management in Kenya, such as:

- the Forest Conservation and Management Act, 2016;
- the Water Act, 2016;
- the Climate Change Act, 2016;
- the Public Health Act, Cap 242;
- the Mining Act, 2016; and
- the Energy Act, 2019.

At the policy level, there exists a National Environmental Policy, sectoral policies such as the National Forest Policy, as well as policies that deal with cross-cutting issues such as climate change – for example, the National Climate Change Framework Policy and the National Policy on Climate Finance. These policies emphasise the need to integrate environmen-

tal considerations in the pursuit of sustainable development.

Kenya operates a devolved system of government; in addition to the above-mentioned national-level laws and policies on environmental protection, the 47 county governments also develop county-specific policy and legislation related to the environment.

2. ENFORCEMENT

2.1 Key Regulatory Authorities

The Ministry of Environment and Forestry is responsible for developing Kenya's national environmental policy. Key regulatory authorities and bodies responsible for environmental enforcement include the following.

The National Environmental Management Authority (NEMA)

NEMA is established under the EMCA and is the main regulatory authority vested with the authority to exercise general supervision and co-ordination over all environmental matters and to implement environment-related policies on behalf of the government.

The National Environment Tribunal (NET)

NET is a tribunal set by the EMCA whose jurisdiction is to address certain appeals brought by parties aggrieved by the decisions of NEMA regarding issues such as the grant, refusal, revocation, variation or limitations of a licence.

The Environment and Land Court (ELC)

The ELC is a court with the status of a high court; it was established in 2011 after enactment of the Environment and Land Court Act, 2011. The court's mandate is expressed in the Constitution as to deal with matters relating to the environment and the use, occupation and title to land. The court exercises appellate jurisdiction over

subordinate and tribunals for matters falling within its jurisdiction.

The National Environmental Complaints Committee (NECC)

The NECC is established under EMCA and vested with the mandate of investigating complaints against NEMA or any person regarding the environmental condition.

NECC is also vested with powers to investigate suspected cases of environmental degradation on its own motion. The investigatory powers of NECC empower it to summon persons before it for purposes of conducting an examination of matters relevant to its investigation. In fostering environmental litigation, EMCA further mandates NECC to undertake environmental public interest litigation.

Sector-Specific Regulators

Different environment sector specific laws have also established institutions to enforce mandates provided for under the respective statutes.

For example, the Water Act establishes a Water Resources Authority to regulate the management and use of water resources. The Act also establishes a Water Tribunal which provides an avenue for appeal to persons aggrieved by decisions relating to water. The decisions made by the Water Tribunal are not final and any person seeking further redress may appeal to the ELC.

3. ENVIRONMENTAL INCIDENTS AND PERMITS

3.1 Investigative and Access Points

The main environmental regulator – NEMA – is vested with investigative and access powers. These powers are held by environmental inspectors appointed by the Director-General of NEMA.

To this end, environmental inspectors may, at all reasonable times and without a warrant:

- enter any land, premises, vessel, motor vehicle or ox-drawn trailer and make examinations and enquiries to determine environmental compliance;
- require the production of documents including licences and registers, and inspect, examine and copy these documents;
- take samples and submit these samples for test and analysis;
- carry out period inspections; and
- seize materials, vessels or anything believed to have been used in the commission of an environmental offence.

With the Director-General's approval, environmental inspectors may also:

- order the immediate closure of polluting or likely to pollute establishments; and
- issue an improvement notice requiring owners or operators to cease environmentally harmful activities and take appropriate remedial measures.

Environmental inspectors also have the powers to make arrests where they have arrest warrants and with the assistance of a police officer. They also have power to prosecute environmental criminal offences.

3.2 Environmental Permits

Environmental permits are required in the conduct of a wide variety of activities in Kenya, particularly those that impact on or are related to the environment.

The permits are largely differentiated based on the enabling statute under which they are issued, the issuing authority and the nature of activity the permit regulates.

Examples of environmental permits include permits for effluent discharge, air emissions, waste management, manufacture, importation and export of controlled substances, and access permits (eg, for access to genetic resources and water). There is also a licensing regime following environmental impact assessment.

The Process of Obtaining Environmental Permits

Environmental permits are taken out before the commencement of the activity in question. In the case of a project for which an EIA licence is a requirement, no licensing authority is allowed to issue any other licence unless the applicant first produces an EIA licence.

Ordinarily, the process to obtain a permit entails the submission of an application in the form prescribed in law and with increasing digitalisation requiring the submission to be done on an online portal to the relevant authority.

The permit application is processed upon the payment of a prescribed fee to the relevant authority and submission of any other relevant information that the authority may deem necessary in making its decision.

Rights of Appeal

The specific statute which provides for the permit will often also articulate the appeal rights against a regulatory body making the permitting decision.

Generally, common grounds for appeal against an authority's decision include the refusal for the grant of a permit, an applicant's opposition to the conditions/limitations or restrictions imposed on an environmental permit, the revocation, suspension or variation of a permit.

Third parties to the permit process, including relevant stakeholders and affected parties who

object to the issue of a permit, also have a right to appeal the approval.

4. ENVIRONMENTAL LIABILITY

4.1 Key Types of Liability

The key types of liabilities that can be faced by project operators, polluters and landowners for environmental damage can either be criminal, civil or administrative depending on the activity, the nature of the complaint and the identity of the parties involved in the claim.

Environmental Civil Liability

Civil liability in environmental matters is underpinned in the Constitution of Kenya Article 70, which provides an avenue for redress to any person claiming that their right to a clean and healthy environment has been or is likely to be infringed, violated, denied or threatened. Compensation is listed as among the reliefs that the court can give to enforce environmental rights. In the enforcement of environmental rights, an applicant is not required to demonstrate loss or injury incurred to be eligible for compensation.

Environmental Criminal Liability

Environmental statutes outline numerous criminal offences to varying degrees for environmental offences such as failure to meet environmental standards. The EMCA, for instance, empowers environmental inspectors to institute and undertake criminal proceedings for offences committed under EMCA against any person before a court of competent jurisdiction.

Part XIII of EMCA on environmental offences carries more elaborate provisions on criminal liability in environmental matters. The offences range from failure to maintain proper records as required under EMCA, to violation of environ-

mental standards under the Act, and for each offence there are prescribed penalties.

Sectoral laws – including the Water Act, 2016, the Forest Conservation and Management Act, 2016, the Wildlife Conservation and the Management Act, 2013 – create criminal offences for various types of environmental breaches. In addition, the Penal Code also recognises certain offences regarding environmental matters.

Environmental Administrative Liability

Administrative actions may be imposed by the respective regulatory authorities. This may take the form of penalties, revocation of licences or permits, imposition of restrictions or limitations, environmental conservation, and restoration orders.

In addition, administrative liability imposed on public servants and public authorities is set out under EMCA, which provides that NEMA can be held liable to pay compensation or damages for injury caused to any person arising from the performance or failure to perform its functions.

Nonetheless, EMCA exempts the government and NEMA from any civil or criminal liability that may be imposed as a result of a project or any consequences of a project.

EMCA also outlines that employees or officers of NEMA cannot be held personally liable for any action where they perform their duties in good faith.

5. ENVIRONMENTAL INCIDENTS AND DAMAGE

5.1 Liability for Historical Environmental Incidents or Damage

The polluter-pays principle is one of the main environmental principles applicable in Kenya.

As such, a current (or purchasing) operator or landowner generally only incurs liability for environmental incidents or damage occasioned by their actions, whether carried out in the past or present.

Common law principles on vicarious liability are recognised under Kenyan law, and an operator or landowner may also be held liable for historic environmental incidents or damage caused by the operator or landowner's employee, servant or agent in circumstances where vicarious liability is deemed to arise.

In all other cases, an owner or operator who is "innocent" – ie, not the polluting party – will generally not be held liable for historic contamination.

Remedial Action

The above notwithstanding, NEMA may issue an environment restoration order to any person in respect of any matter relating to the management of the environment.

The order may require the person to take action to prevent the continuation of pollution or environment hazard, which could be arising from historic contamination.

An operator or landowner who is subjected to a restoration order may, however, appeal this order to the NET and, if necessary, appeal NET's decision at the Environment and Land Court.

Where restoration orders are imposed on historically contaminated land, this would tie in with the Integrated National Land Use Guidelines issued by NEMA, which set out guidelines for the management of contaminated land, empowering NEMA to investigate contaminated sites and recommend remedial measures.

5.2 Types of Liability and Key Defences Types of Liability for Environmental Incidents or Damage

As explained under **4.1 Key Types of Liability**, environmental liability takes the form of civil and/or criminal or administrative liability. In addition to courts having the power to impose civil sanctions for environmental breaches, persons who commit environmental breaches under environmental laws in Kenya are subject to administrative actions as may be imposed by the respective regulatory authorities.

Examples of these administrative actions include penalties, revocation of licences or permits, imposition of restrictions or limitations, environmental conservation and restoration orders.

Where a person is aggrieved by the administrative action undertaken by a regulatory body relating to administrative liability, they are entitled under the Constitution and the Fair Administrative Act, 2015, to have the action reviewed by a court or tribunal.

Key defences include:

- force majeure – a party may rely on force majeure events or acts of God as a defence in cases where environmental breach is deemed to be as a result of actions beyond its control;
- contributing actions of affected party – an affected party who contributes to the causation of an environmental breach may in certain cases offer a defence to the party which is subject to environmental liability;
- mitigation of damage – a defence in the case of nuisance or pollution would apply where it is shown that the defendant has done what is practically reasonable to prevent and/or reduce the nuisance or pollution.

Reasonable measures that may be taken to prevent, minimise and rectify the pollution or degradation may include:

- assessing the impact on the environment;
- informing employees on environmental risks of their work and the way their tasks must be performed to avoid causing significant pollution or degradation of the environment;
- ceasing, controlling any act, activity or process causing the pollution or degradation; or
- eliminating the source of the pollution.

The Effect of an EIA Licence

The issuance of EIA licence is no defence for any civil or prosecution action, regarding the manner of execution, operation or management of a project.

6. CORPORATE LIABILITY

6.1 Liability for Environmental Damage or Breaches of Environmental Law

There are no particular rules concerning liability of corporate entities that cause environmental damage or breaches of environmental law, as the offences apply in the same way to both individuals and corporate entities although there are differences in how sentencing is meted out.

6.2 Shareholder or Parent Company Liability

Kenya recognises the principle of separate legal personality so that the company is distinct and separate from its shareholders or parent company. As such the shareholders of a company or its parent company will generally not be liable for environmental damage or breaches of environmental law by reason only of their shareholding.

Courts will generally be reluctant to impose liability upon shareholders or the parent company except in special circumstances, such as where

the company that was incorporated is a façade or sham to escape liability or legal obligation.

7. PERSONAL LIABILITY

7.1 Directors and Other Officers

Under EMCA, it is possible for directors and other officers to be liable for environmental damages or breaches of environmental law committed by the company if it can be shown that they had knowledge of the commission of the offence and did nothing to ensure compliance with the law.

The penalties imposed will depend on the nature of offence committed, but upon conviction it can result in a fine, imprisonment or both.

Other legislations – such as the Climate Change Act, 2016 – also impose corporate liability on directors or officers of a corporate body who had knowledge of a commission of an offence and failed to exercise due diligence to ensure compliance with the Act. Both fines and imprisonment may be imposed on directors found liable.

7.2 Insuring against Liability

Insurance can be taken by directors to insure against the costs of environmental damage or breach proceedings or compensation to third parties, but it is unlikely to be available where the liability involves a fine imposed in criminal proceedings, or failure to comply with requirements of regulatory authority (due to public policy concerns), and it will not assist where a prison sentence is imposed.

8. LENDER LIABILITY

8.1 Financial Institutions/Lender Liability

A financial institution/lender is generally not liable for the environmental damage or breaches

of environmental law by its borrower. However, the extent of a lender's knowledge and control of the activities leading to the breach may lead to determination of the lender's liability, depending on the facts of the case.

8.2 Lender Protection

A lender can protect itself from environmental liability by:

- conducting due diligence to ascertain if the borrower is licensed and in compliance with the environmental law;
- requiring certain representations from the borrower that it has complied with environmental law and that there is no environmental breach and an indemnity to the lender should this turn out to be incorrect.

A lender will also need to be cautious in taking direct control of the management decisions of the borrower or taking over assets that may require remediation.

9. CIVIL LIABILITY

9.1 Civil Claims

Civil claims for compensation or other remedies can be brought in any instances where actions are brought under the law of tort – for example, for private and/or public nuisance, negligence, trespass and the rule in *Rylands v Fletcher* (1868).

Claims can also be brought in any case where a person alleges that the constitutionally guaranteed right to a clean and healthy environment is being or is likely to be denied, violated, infringed, or threatened.

9.2 Exemplary or Punitive Damages

Exemplary or punitive damages may be awarded in the following circumstances:

- where there is oppressive arbitrary or unconstitutional action by servants of government;
- where the defendant's conduct is calculated to make them a profit which may well exceed the compensation payable to the plaintiff; or
- where a statute authorises the payment of exemplary damages.

9.3 Class or Group Actions

Class or group actions are possible for environment-related civil claims.

These are recognised under Kenya's Civil Procedure Rules which allow the commencement of representative proceedings by persons with the same (common) interest in any proceedings.

Further, the Constitution of Kenya allows persons acting as a member of, or in the interest of, a group or a class of persons, to institute suits to protect their rights.

9.4 Landmark Cases

Recent landmark environmental cases in Kenya include the following.

Isaiah Luyara Odando & another v National Management Environmental Authority (NEMA) & 2 others; County Government of Nairobi & 5 others (Interested Parties) [2021] eKLR

This case involved a constitutional petition brought as a class action against the state (the "respondents") for failure to stop pollution of the Nairobi and Athi River, and failure to prevent toxic air from emissions from the Dandora dumpsite and industries.

The court found in favour of the petitioners and directed the respondents to adopt the precautionary principle in the management of the environment. The court innovatively made specific orders for remedial action in the way of a statutory interdict (continuing orders), to ensure the court monitors compliance by seeking periodic

reports from the respondents on the progress in implementing the court orders.

KM & 9 Others v Attorney General & 7 Others [2020] eKLR

This case involved a class action constitutional petition brought by the petitioners, on behalf of residents of Owino-Uhuru Village in Mombasa County, against the state and two private corporations (the “respondents”), for the activities of a lead acid batteries recycling factory that produced toxic waste and caused lead poisoning among local residents.

In its judgment, the Environment and Land Court awarded the petitioners KES1.3 billion, one of the highest amounts of general damages in a case concerning pollution in Kenya.

The court also ordered the respondents to clean up the soil and water and remove any waste deposited within the settlement within four months (120 days) from the date of the judgment, or in default pay KES700 million to the petitioner to co-ordinate the soil/environmental clean-up exercise.

10. CONTRACTUAL AGREEMENTS

10.1 Transferring or Apportioning Liability

Parties to a contract can agree on the apportionment of liabilities between them, but these agreements do not have a binding effect or influence on third parties or regulators if they are made between private parties such as buyers and sellers. Generally, an agreement to indemnify against fines imposed by the regulator or court will not be enforceable on public policy grounds.

10.2 Environmental Insurance

Environmental insurance is available in Kenya; it will typically cover risks such as pollution clean-up costs and third-party property and environmental damage, as well as legal costs.

11. CONTAMINATED LAND

11.1 Key Laws Governing Contaminated Land

Contaminated land in Kenya is governed by the Integrated National Land Use Guidelines which provide for methods of preventing the contamination of land through ensuring compliance and enforcing licensing conditions. They provide for the maintenance of a Contaminated Land Register, which is to be made accessible to the public.

Further, the Guidelines empower NEMA and other relevant authorities to undertake site investigations of the contaminated land and evaluate the remedial reports filed by proponents. NEMA is further empowered to develop and approve site management plans for such land.

Remediation measures may include a requirement for a polluter to:

- restore the environment as near as it may be to the state it was in before the polluting or damaging action;
- stop the action which is causing or is likely to cause harm to the environment;
- compensate persons whose environment or livelihood has been harmed by the polluting or damaging action; or
- pay the clean-up costs incurred by a third party authorised to take action to restore the environment.

12. CLIMATE CHANGE AND EMISSIONS TRADING

12.1 Key Policies, Principles and Laws

Climate change is governed predominantly by the Climate Change Act, 2016, and a number of policies, plans and strategies at both the national level and county level. Counties have also enacted county-specific climate change laws, as well as County Climate Change Fund laws to deal with climate financing at the sub-national level.

Kenya's policy approach is to pursue low-carbon climate-resilient development. Priority is towards adaptation, and the country endeavours to pursue mitigation that offers adaptation co-benefits. Climate action is also informed by the principles of sustainable development, equity and social inclusion in the allocation of effort, costs and benefits, integrity and transparency, and stakeholder participation.

The following are the key national laws, policies and plans that govern climate change in Kenya.

Key Laws

The Climate Change Act, 2016, is the main law regulating climate change in Kenya. Its provisions are aimed at developing, managing, implementing and providing a mechanism to enhance climate change resilience and low-carbon development for the sustainable development of Kenya.

Key Policies and Plans

- The National Adaptation Plan, 2015–2030, consolidates the country's vision on adaptation and provides for adaptation actions to enhance long-term resilience and adaptive capacity.
- The National Climate Change Action Plan (NCCAP), 2018–2022, articulates mechanisms and measures to be implemented within

the five-year period to achieve low-carbon climate-resilient development.

- The National Climate Change Framework Policy, 2016, which was developed based on the findings of the National Climate Change Action Plan (NCCAP, 2013–2017) to promote an integrated response to climate change, reduce vulnerability to climate change and build the country's resilience.
- The Kenya Climate Smart Agriculture Strategy (KCSAS), 2017–2026, is one of the tools developed to implement Kenya's Nationally Determined Contribution in the agriculture sector.
- The National Policy on Climate Finance, 2018, was developed to better position the country to access climate finance and identifies the National Treasury as the custodian of climate finance matters in Kenya.

12.2 Targets to Reduce Greenhouse Gas Emissions

Kenya's greenhouse gas (GHG) emissions target is set out in the country's updated Nationally Determined Contribution (NDC) which indicates a goal of reducing GHG emissions by 32% by 2030, relative to the BAU scenario of 143 MtCO₂ eq.

13. ASBESTOS

13.1 Key Policies, Principles and Laws Relating to Asbestos

Key policies and laws relating to asbestos recognise that the material has been used for roofing in Kenya in the past, and there is need to replace its use with more environmentally safe materials, hence the necessity for the safe disposal of asbestos.

The handling and disposal of asbestos is mainly governed by the following.

The Environmental Management and Coordination Act, 1999, and the Environmental Management and Coordination (Waste Management) Regulations, 2006, which provide that any waste containing asbestos in the form of dust or fibres is categorised as hazardous waste. Hazardous waste can only be disposed of in a specific manner that has been approved by NEMA.

The National Guidelines on Safe Management and Disposal of Asbestos, 2013, which aim to protect the environment and reduce risk posed to the public and workers from asbestos fibres. The Guidelines highlight precautionary measures in dealing with asbestos, including the carrying out of risk assessments, EIA, notifications, and the requirements for handling specific kinds of asbestos and requirements for safe transportation and disposal.

14. WASTE

14.1 Key Laws and Regulatory Controls

Kenya has a number of laws and policies governing waste. However, the sector is in a state of flux, with law and policy-makers seeking to overhaul the current regime and replace it with a framework that is aligned to the Constitution of Kenya, 2010, and capable of meeting the challenges facing the waste sector at present. Regulations under development include on extended producer responsibility and sustainable waste management.

The current waste laws and regulations are as follows.

The Environmental Management and Coordination Act, 1999

The Act sets out one of the principles that guide waste management – the polluter-pays principle. This principle is defined to mean that the cost of cleaning up any element of the environment

damaged by pollution, compensating victims of pollution, cost of beneficial uses lost as a result of an act of pollution and other costs that are connected with or incidental to the foregoing, is to be paid or borne by the person convicted of pollution under the Act or any other applicable law.

The Act also provides that every person whose activities generate wastes shall employ measures essential to minimise wastes through treatment, reclamation and recycling.

Environmental Management and Coordination (Waste Management) Regulations, 2006

The regulations provide that a waste generator shall minimise the waste generated by monitoring the product cycle from beginning to end by:

- enabling the recovery and re-use of the product where possible;
- reclamation and recycling; and
- incorporating environmental concerns in the design and disposal of a product.

The regulations further place an obligation on waste generators to segregate the waste and ensure that it is transferred to a person who is licensed to transport and dispose of such waste in a designated waste disposal facility.

Specific waste material is also managed through regulatory bans, such as bans on the use of plastic bags, as well as notices banning the use of single-use plastic in protected areas.

14.2 Retention of Environmental Liability

Currently, there are no regulations to hold a producer or consignor of waste liable after disposal by a third party.

In the case of plastic bags, however, Kenya has enforced a ban on all plastic carrier bags used as

secondary packages. Flat plastic bags used for industrial primary packaging are exempt upon receiving clearance from NEMA, so long as they meet laid-out criteria, which includes that the name of the industry and product packaged is clearly labelled.

In granting clearance, NEMA requires the responsible persons for plastic materials exempted to avoid where necessary, or take due diligence to segregate and direct all used plastics materials to recycling facilities, as opposed to being dumped with general waste. The requirement for labelling ensures that NEMA can address any dumping with the producer whose details appear on the packaging.

14.3 Requirements to Design, Take Back, Recover, Recycle or Dispose of Goods

A producer of goods is generally required to undertake environmentally sound practices throughout a product's life cycle to reduce pollution. These practices include undertaking suitable product recovery and disposal measures such as product re-use, creation of take back schemes, recycling and composting.

These practices are currently being undertaken by industry voluntarily – however, the draft Environmental Management and Co-ordination (Extended Producer Responsibility) Regulations, 2021 (“proposed EPR Regulations”) set out a requirement for mandatory extended producer responsibility schemes on every producer of products listed in the First Schedule. These products include:

- packaging for non-hazardous products (plastics, papers, aluminium, composite, glass and cartons);
- hazardous products' packaging (industrial chemicals, oil and lubricants, pharmaceuti-

- als, agrochemicals, veterinary, paints and solvents) and agricultural films;
- electrical, electronic equipment, mercury auto switches, thermostats, batteries and accumulators;
- end-of-life motor vehicles, automobiles, aircrafts, locomotives;
- non-packaging items (plastics, glass, paper, cardboard);
- furniture (except wooden, metallic);
- rubber and tyres.

15. ENVIRONMENTAL DISCLOSURE AND INFORMATION

15.1 Self-Reporting Requirements

Self-reporting for environmental breaches is implicit under the Constitution, which mandates every person to co-operate with the state and other persons for purposes of environmental conservation. This obligation is also reiterated in the Environmental Management and Coordination Act, 1999.

More explicit requirements for self-reporting are also set out in sector-specific laws and regulations such as on air quality, energy and extractives. These requirements are also often included as licence conditions.

Where self-reporting is explicitly mandated, it will often be required within a stipulated period upon the occurrence of the event – usually 24–48 hours.

In some cases, the owner or operator of the facility that is the subject of the environmental incident or damage will also be required to describe the circumstances surrounding the event, and the corrective measures taken or planned to be taken to prevent future occurrence of the same.

15.2 Public Environmental Information

The public is constitutionally entitled to information held by the state (ie, a government office, organ or entity), and any other person, if it is required for protection of any human right.

A member of the public will need to utilise the process set out in the Access to Information Act, 2016, in requesting the information. The request may be denied on a variety of grounds including if it is commercially sensitive, if it is the subject of legal proceedings, or for the sake of national security.

The Environmental Management and Coordination Act also entitles every person to any information needed for implementation of the Act, that may be held by NEMA or lead agencies.

A lead agency comprises any government ministry, department, parastatal, state corporation or local authority, vested by any law with a mandate to control or manage elements of the environment or natural resources.

However, certain categories of environmental information, such as EIA study reports, are required to be published and readily available for interested members of the public, without their need to make a formal request for access.

15.3 Corporate Disclosure Requirement

Corporations in Kenya do not have an obligation to disclose environmental information in their company reports, except for in the following instances where disclosure requirements exist.

Listed companies whose equity share capital is contained in the official list on a stock exchange or other regulated market in Kenya (quoted companies) are required under the Company's Act to prepare business reviews that include information on the company's impact on the environment.

The boards of issuers of securities to the public are also required by the Capital Markets Authority to promote integrated reporting that provides material information on an organisation's commercial, social and environmental context within which it operates.

Institutions licensed under Kenya's Banking Act – such as commercial banks and mortgage finance companies – are required by the Central Bank of Kenya to develop an appropriate approach to disclosing climate-related information to enhance transparency. Disclosure benchmarked to the Task Force on Climate-related Financial Disclosures Framework is set out to begin in the period from January 2023 to June 2023.

16. TRANSACTIONS

16.1 Environmental Due Diligence

Environmental due diligence is an increasingly important component in M&A, finance and property transactions.

The main objective in such an exercise will typically be the ascertainment of potential liabilities and whether there exist the requisite assessments, permits, approvals and licences.

This is particularly important in the case of environmental impact assessment licences, where the transferee and transferor remain liable for all liabilities existing on the transfer date.

16.2 Disclosure of Environmental Information

In Kenya, a seller is not obligated to disclose any environmental information to a purchaser, and it is generally for the purchaser to find out everything that is important to it or that it requires to know in order to make its purchase.

A purchaser will typically ask specific questions and require that a full answer be provided and, in this process, further issues that require response may also arise.

A seller is, however, under an obligation not to make misrepresentations or fraudulent claims.

There also exists potential for more specific intervention. For example, the Forest Conservation and Management Act, 2016, makes provision for tax incentives to encourage forest conservation and management; additionally, the Climate Change Act, 2016, makes provision for the grant of incentives to persons undertaking activities that mitigate the adverse effects of climate change.

17. TAXES

17.1 Green Taxes

Green taxes in Kenya are largely in the form of incentives. These include zero rating of import duty and VAT exemptions for renewable energy products (eg, solar and wind energy development equipment), lowered excise duty on importation of fully powered electric vehicles and exemption from withholding tax paid to a non-resident for specific services provided under a power purchase agreement, as well as exemptions for income from green bonds.

Contributed by: Clarice Wambua and Esther Kimanzi, Cliffe Dekker Hofmeyr

Cliffe Dekker Hofmeyr is a full-service law firm with an extensive reach across Africa, consisting of more than 350 lawyers and a track record spanning 168 years. Cliffe Dekker Hofmeyr (CDH) believes the right partnerships lead to great achievements. In April 2021, CDH joined forces with Nairobi-based boutique corporate law firm Kieti Law LLP (Kieti) in a move to bolster the capabilities of both firms in the continent's East African economic hub and better service clients' needs in eastern and southern Africa. With first-hand, in-depth experience, CDH of-

fers sector-specific expertise and knowledge of regulatory nuances to provide an exceptional integrated service across Africa. The firm's lawyers combine detailed legal knowledge of the environmental sector with commercial awareness and are frequently involved in advising on a broad range of environmental matters. CDH's recent work includes drafting various subsidiary pieces of legislation under the Climate Change Act, 2016, and the Energy Act, 2019; and advising on the regulatory framework for payment for ecosystem services.

AUTHORS



Clarice Wambua is a partner in CDH's environmental law, and pro bono and human rights practice areas. She is a Master of Laws (LLM, with distinction), Climate Change Law and Policy,

University of Strathclyde, UK, as well as a Master of Science (MSc, with distinction), Africa and International Development, University of Edinburgh, UK. Clarice is a member of the Council of Women in Energy and Environmental Leadership (CWEEL), Kenya, as well as the Association of Women in Energy and Extractives, Kenya (AWEIK). Amongst her publications are A Comparative Look at South Africa and Kenya's Approach to Climate Change Impact Assessments, (Wambua C. et al), Without Prejudice, Quarter 3, 2021; The Kenya Climate Change Act 2016: Emerging Lessons from a Pioneer Law, (2019) Carbon and Climate Law Review, Vol 13 Issue 4; and Climate Change Governance Through the Kenyan Constitution: Bastion of Hope or Boulevard of Broken Dreams? in Kameri Mbote P. and Kibugi R. (eds), Environmental Law Governance in Kenya, (2021, forthcoming).



Esther Kimanzi is an associate in CDH's corporate and commercial and environmental practice. She has experience in environmental law and corporate and commercial legal practices.

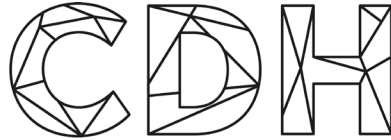
Esther achieved an LLB (Honours) from the University of Nairobi. Her publications include A Comparative Look at South Africa and Kenya's Approach to Climate Change Impact Assessments, (Wambua C., Werner M., Pienaar A., Kimanzi E. et al), Without Prejudice, Quarter 3, 2021.

Contributed by: Clarice Wambua and Esther Kimanzi, Cliffe Dekker Hofmeyr

Cliffe Dekker Hofmeyr

Merchant Square, 3rd floor
Block D
Riverside Drive
P.O. Box 22602-00505
Nairobi
Kenya

Tel: +254 731 086 649
Email: clarice.wambua@cdhlegal.com
Web: www.cliffedekkerhofmeyr.com



CLIFFE DEKKER HOFMEYR

INCORPORATING
KIETI LAW LLP, KENYA

Trends and Developments

Contributed by:

Clarice Wambua and Esther Kimanzi

Cliffe Dekker Hofmeyr see p.219

Towards Low-Carbon Climate-Resilient Development

On 28 December 2020, Kenya submitted its updated Nationally Determined Contribution (NDC), which aims to abate greenhouse gas emissions by 32% by 2030, relative to the BAU scenario of 143 MtCO₂ eq.

The NDC focuses on priority sectors for mitigation, including:

- scaling up nature-based solutions;
- enhancing REDD+ activities;
- climate-smart agriculture, with an emphasis on livestock management systems;
- emphasising renewable, clean, efficient and sustainable energy technologies;
- energy and resource efficiency;
- sustainable waste management;
- low-carbon transportation; and
- initiatives in blue carbon.

On adaptation, the NDC recognises that this is the highest priority for the country and commits to enhancing adaptation ambition by bridging implementation gaps, noting that some of the adaptation action may have mitigation co-benefits.

To meet its NDC commitments, Kenya intends to participate in both market and non-market mechanisms to scale-up climate financing. To this end, Kenya plans to develop legislation and institutional frameworks to enable its utilisation of these mechanisms, as envisioned under Article 6 provisions of the Paris Agreement.

This legislation is likely to be developed in the short-to-medium term and will join ongoing reg-

ulatory development efforts in the country. Over the past few years, Kenya has been involved in legislative development to put in place subsidiary legislation to operationalise its Climate Change Act, 2016. Current draft regulations include the following.

- The Draft Climate Change (Public Participation and Access to Information) Regulations, 2021, which aim to reinforce the constitutional requirements for public participation in climate governance by outlining substantive and procedural mechanisms for public involvement and access to climate change information.
- The Draft Climate Change (Duties and Incentives) Regulations, 2021, which seek to impose climate change duties on private entities and public entities – both at national and county levels – and to incentivise public and private entities which engage in climate change initiatives.
- The Draft Climate Change (Monitoring, Reporting and Verification) Regulations, 2021, which aim to guide and impose obligations on entities for the monitoring, reporting and verification of climate actions. Once enacted as law, these regulations will apply to the monitoring, reporting and verification of greenhouse gas emissions, mitigation actions, adaptation actions and climate change enablers such as climate finance.
- The Draft Public Finance Management (Climate Change Fund) Regulations, 2018, which aim to establish the Climate Change Fund (CCF) provided for under Section 25 of the Climate Change Act, as a financing mechanism for the priority climate change actions and interventions.

Environmental fiscal incentives have also been used to drive Kenya's quest for low-carbon climate-resilient development. In the renewable energy sector, the Finance Act, 2021, reinstated VAT exemption for specialised equipment used in the development and generation of solar and wind energy. In 2019, the Finance Act lowered the excise duty charged on importation of fully powered electric vehicles from 20% to 10%. This reduced duty, however, only applies to 100% electric four-wheel vehicles, buses and minibuses, with a seating capacity of more than 29 people.

There are also plans underway by the National Treasury of Kenya to have in place a National Policy Framework on Green Fiscal Incentives Policy Framework. This call by the government has been driven by the urge to apply a coherent approach to green fiscal incentives, which play a critical role in steering a low-carbon climate-resilient pathway. Currently, the policy, which is in draft form, contains salient proposals such as the establishment of the Kenya Green Investment Bank (KeGIB) and considers the introduction of a carbon tax.

The Move towards Environmental, Social and Governance Compliance

The past year has seen increased momentum in Kenya for environment social and governance (ESG) issues. Most recently, with the publication of the Guidance on Climate-Related Risk Management by the Central Bank in October 2021, the banking sector is now in the frontline of driving Kenya towards a low-carbon future.

The Guidance contains requirements that banking institutions should adopt to effectively integrate climate-related financial risks in their management frameworks and business decisions and activities. Under these guidelines, banks will be required to:

- entrench financial risk considerations in their governance systems;
- include climate change and environment-related financial risks into their existing financial management practices; and
- develop a disclosure approach for financial climate-related risks.

The Nairobi Securities Exchange (NSE) is also among the institutions that will impact sustainability in the financial sector through its formulation of the proposed NSE ESG Disclosure Guidance Manual, 2021. The proposed manual provides guidance to companies listed on NSE on how to incorporate ESG strategies and reporting on ESG disclosures. The insurance industry has also set up a taskforce on ESG that will drive and support readiness of the insurance sector in managing ESG risks and supporting green finance. This aligns with earlier developments, such as African insurance organisations signing the Nairobi Declaration on Sustainable Insurance on 22 April 2021.

With the increasing recognition of the need to integrate ESG in day-to-day corporate operations, it is likely that ESG disclosure and reporting requirements will soon be a mandatory requirement for more and more entities in the different sectors of the economy.

Realising the Right to Water

Kenya is slowly making progressive steps towards the realisation of the constitutional right to clean and safe water in adequate quantities. Following the promulgation of the Constitution of Kenya in 2010, Parliament enacted the Water Act in 2016 to provide for the development, regulation, and management of water resources in line with the new Constitution. Various regulations have recently been formulated to operationalise the Water Act and address pertinent issues facing the water sector that have an impact on the right to water. These include:

- the Water Services Regulations, 2021, which seeks to regulate water service provision in the country by providing guidance on the mandates of national and county governments in the realisation of the right to water;
- the Water Resources Regulations, 2021, which aim to govern the use of water resources in Kenya by articulating the type of water use activities that require authorisation from the Water Resources Authority; and
- the Water Harvesting and Storage Regulations, 2021, which govern waterworks relating to water harvesting and storage.

In regulating water use in the irrigation sector, the Cabinet Secretary for Water, Sanitation and Irrigation has also formulated the Irrigation (General) Regulations, 2021, revoking the outdated Irrigation (National Irrigation Schemes) Regulations of 1977.

The new regulations are designed to ensure sustainable development, management and financing of the irrigation sector in Kenya, and set out licensing requirements for irrigation schemes, as well as the irrigation standards and quality control measures required for persons running or developing irrigation schemes. In this regard, developments in the water sector also have a close connection with agriculture and food security in the country.

Embracing a Circular Economy

The waste sector in Kenya is mainly governed by regulations enacted in 2006. To realise the right to a clean and healthy environment, and address present-day challenges facing the sector, there have been recent attempts at developing legislation that fully embraces a circular economy.

These developments include the draft Sustainable Waste Management Bill, 2021, which seeks to establish a legal and institutional framework for sustainable waste management. Some of the

highlights of the Bill include provision of incentives to increase private sector investment in recycling activities, as well as bolstering local production and importation of sustainable waste management equipment and materials. There are also draft Extended Producer Responsibility (EPR) Regulations at the final stages of development, which give producers clear-cut post-consumer waste responsibilities, thus imposing obligations on producers for the entire life of a product, unlike the current waste management regime.

Extended producer responsibility has so far been ongoing without mandatory regulation, as part of industry self-regulation. Importantly, following the ban on the use, manufacture and importation of plastic bags used for commercial and household packaging in 2017, there has been an administrative requirement on the part of producers of primary industrial plastic packaging (who are exempted from the plastics ban), to demonstrate in the course of their obtaining clearance for production how they will facilitate take-back schemes for their plastic. This requirement has further created impetus for EPR schemes in Kenya.

Fronted by the Kenya Association of Manufacturers, the past two years have seen the launch of the Kenya Plastic Action Plan, the establishment of the Kenya Extended Producer Responsibility Organization (KEPRO), and the launch of the Kenya Plastics Pact (KPP). These initiatives recognise that realisation of a circular economy requires a united front, and bring together businesses, governments, researchers, NGOs, civil society, informal waste sector players and other stakeholders across the plastics value chain to transform the linear waste economy to a circular waste economy.

Responding to the Pandemic

In response to the COVID-19 pandemic, which triggered an increase in waste such as used masks and gloves, the Ministry of Health formulated additional procedures to guide waste management in the healthcare sector, issuing both the Safe Management and Disposal of Safety Product in Prevention of Spread of COVID-19 Guidance and the Interim Infection Prevention and Control Recommendations for Coronavirus Disease 2019 (COVID-19) in Health Care Settings.

The National Environment and Management Authority also developed the National Guidelines for the Management of COVID-19 Waste. These guidelines relate to segregation of biomedical waste, securing, packaging, storage and disposal of all generated medical waste such as surgical gloves, face masks and sanitiser bottles, which pose both environmental and health risks.

At the height of the pandemic, Kenya also witnessed a raft of incentives and interventions to cushion the public from the pandemic's adverse economic impacts. For instance, the President launched the 8-Point Economic Stimulus Programme which, inter alia, focused on mitigating the impacts of climate change and deforestation, with government setting aside: KES850 million to rehabilitate wells, water plans and underground tanks in arid and semi-arid areas; KES1 billion for flood control; and KES540 million for the Greening Kenya Campaign.

However, in tandem with this was a move to withdraw green incentives that had earlier been issued – for example, the Tax Laws (Amendment) Act No 2 of 2020, which withdrew the reduced corporate income tax rates of 15% for the first five years for companies operating plastics recycling plants. The effect of this is that such companies are now subject to the usual corporate tax rate of 30%.

Revising the Environmental Framework Law

Currently, the main law governing the environment in Kenya is the Environmental Management and Coordination Act, 1999 (EMCA). Whilst EMCA has been instrumental in providing an enabling legal and institutional environment for the management of the environment, it has been unable to ensure that the country fully addresses present-day environmental challenges in the devolved system of government which is a feature of governance in Kenya. This has prompted the Draft Environmental Management and Coordination Bill, 2021.

The Bill seeks to establish a legal and institutional framework that is appropriate for the management of the environment by improving the national capacity for environmental management. Among new institutions proposed in the Bill is the National Environment Research Institute, whose main function will be undertaking and co-ordinating environmental research.

Law-makers are currently seeking stakeholder comments on the Bill, and it is likely that there will be further amendments to it aimed at recalibrating and harmonising environmental governance in Kenya, based on stakeholder views and concerns.

Cliffe Dekker Hofmeyr is a full-service law firm with an extensive reach across Africa, consisting of more than 350 lawyers and a track record spanning 168 years. Cliffe Dekker Hofmeyr (CDH) believes the right partnerships lead to great achievements. In April 2021, CDH joined forces with Nairobi-based boutique corporate law firm Kieti Law LLP (Kieti) in a move to bolster the capabilities of both firms in the continent's East African economic hub and better service clients' needs in eastern and southern Africa. With first-hand, in-depth experience, CDH of-

fers sector-specific expertise and knowledge of regulatory nuances to provide an exceptional integrated service across Africa. The firm's lawyers combine detailed legal knowledge of the environmental sector with commercial awareness and are frequently involved in advising on a broad range of environmental matters. CDH's recent work includes drafting various subsidiary pieces of legislation under the Climate Change Act, 2016, and the Energy Act, 2019; and advising on the regulatory framework for payment for ecosystem services.

AUTHORS



Clarice Wambua is a partner in CDH's environmental law, and pro bono and human rights practice areas. She is a Master of Laws (LLM, with distinction), Climate Change Law and Policy,

University of Strathclyde, UK, as well as a Master of Science (MSc, with distinction), Africa and International Development, University of Edinburgh, UK. Clarice is a member of the Council of Women in Energy and Environmental Leadership (CWEEL), Kenya, as well as the Association of Women in Energy and Extractives, Kenya (AWEIK). Amongst her publications are *A Comparative Look at South Africa and Kenya's Approach to Climate Change Impact Assessments*, (Wambua C. et al), *Without Prejudice*, Quarter 3, 2021; *The Kenya Climate Change Act 2016: Emerging Lessons from a Pioneer Law*, (2019) *Carbon and Climate Law Review*, Vol 13 Issue 4; and *Climate Change Governance Through the Kenyan Constitution: Bastion of Hope or Boulevard of Broken Dreams?* in Kameri Mbote P. and Kibugi R. (eds), *Environmental Law Governance in Kenya*, (2021, forthcoming).



Esther Kimanzi is an associate in CDH's corporate and commercial and environmental practice. She has experience in environmental law and corporate and commercial legal practices.

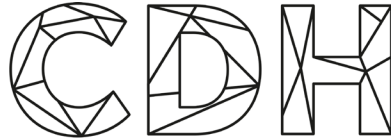
Esther achieved an LLB (Honours) from the University of Nairobi. Her publications include *A Comparative Look at South Africa and Kenya's Approach to Climate Change Impact Assessments*, (Wambua C., Werner M., Pienaar A., Kimanzi E. et al), *Without Prejudice*, Quarter 3, 2021.

Contributed by: Clarice Wambua and Esther Kimanzi, Cliffe Dekker Hofmeyr

Cliffe Dekker Hofmeyr

Merchant Square, 3rd floor
Block D
Riverside Drive
P.O. Box 22602-00505
Nairobi
Kenya

Tel: +254 731 086 649
Email: clarice.wambua@cdhlegal.com
Web: www.cliffedekkerhofmeyr.com



CLIFFE DEKKER HOFMEYR

INCORPORATING
KIETI LAW LLP, KENYA