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Kenya

ENVIRONMENT

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This country-specific Q&A provides an overview of environment laws and regulations applicable in Kenya.

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KENYA ENVIRONMENT



1. What is the environmental framework and the key pieces of environmental legislation in your jurisdiction?

The environmental framework in Kenya is governed by several laws and regulations that are designed to protect the environment and natural resources, and to ensure that activities that have potential environmental impacts are carried out in a responsible and sustainable manner.

Some of the key pieces of environmental legislation in Kenya include the Constitution which is the basis of all the other laws. It guarantees the right to a clean and healthy environment and imposes a duty on the state and all persons in the country to protect the environment and conserve natural resources. The Environmental Management and Coordination Act is the framework environmental law in Kenya and the main law for overall environmental management and protection in the country. There are also sectoral laws governing different natural resources such as water, wildlife, mining, agriculture and forestry, and these laws address specific environmental issues applying to those respective sectors.

2. Who are the primary environmental regulatory authorities in your jurisdiction? To what extent do they enforce environmental requirements?

The primary environmental regulatory authority is the National Environment Management Authority (NEMA). NEMA is established by Environmental Management and Coordination Act as the main regulatory body for environmental matters in Kenya and is the body with authority to regulate and enforce environmental laws and regulations.

NEMA takes a proactive approach to ensuring that individuals and organizations comply with environmental laws and regulations and utilizes a variety of tools at its disposal. These tools include issuing warnings, carrying out inspections with environmental inspectors having

prosecutorial powers, and issuing permits or approvals and where a licensee contravenes the provisions of the licence, taking action to cancel, revoke or suspend such licence.

3. What is the framework for the environmental permitting regime in your jurisdiction?

The environmental permitting regime in Kenya is governed by the Environmental Management and Coordination Act and the regulations developed thereunder. NEMA, which is established under this Act, issues a wide range of environmental licenses such as Environmental Impact Assessment (EIA), effluent discharge, waste management, transporters, incinerators and recyclers and import export for controlled substances licences; as well as permits such as for access to genetic resources; trans boundary movement of waste and sand harvesting, sale and transportation permits. In addition to NEMA, other sectoral regulatory bodies may issue certain permits relevant to their sector as set out in the different sectoral laws.

4. Can environmental permits be transferred between entities in your jurisdiction? If so, what is the process for transferring?

Environmental permits can generally be transferred between entities, subject to the terms and conditions of the permit and any applicable laws and regulations. The process for transferring an environmental permit in Kenya will depend on the specific law and the requirements of the relevant regulatory authority.

In the case of an EIA licence for example, the transfer process is detailed in law and a condition of transfer is that the transferee's interest project or programme must be in relation to the transferor's project to which the permit was issued. The process for transfer requires the

transferor and the transferee to jointly notify NEMA's Director-General in writing of the transfer, not later than thirty days after the transfer. Where no joint notification of a transfer is given, the registered holder of the permit is deemed the owner or the person having charge or management or control of the project. Any transfer of an EIA licence takes effect on the date NEMA's Director-General is notified of the transfer.

5. What rights of appeal are there against regulators with regards to decisions to grant environmental permits?

Anyone dissatisfied with a decision of NEMA to grant an environmental permit has the right to appeal that decision. Appeals can be made to the National Environment Tribunal (NET) which is established under the Environmental Management and Coordination Act to hear and determine disputes relating to environmental matters, including appeals of decisions by NEMA.

To file an appeal with the NET, an individual or organization must submit a written notice of appeal to the NET, setting out the grounds for the appeal and the relief sought. The notice of appeal must be filed within 60 days of the date on which the decision being appealed was made. The NET will then set a date for the hearing of the appeal and will consider the evidence and arguments presented by the parties involved. NET's decision may be appealed to the High Court of Kenya within 30 days of the decision being made.

6. Are environmental impact assessments (EIAs) for certain projects required in your jurisdiction? If so, what are the main elements of EIAs and to what extent can EIAs be challenged?

Environmental Impact Assessments (EIA) are required for certain types of activities that have the potential to significantly affect the environment. Proposed projects centred around these activities are required to undergo an EIA before they can be approved, with NEMA issuing an EIA licence on such terms and conditions as it may deem necessary to signify approval.

Projects which require an EIA are set out in the Second Schedule to the Environmental Management and Coordination Act and the EIA process is further elaborated in the Environmental (Impact Assessment and Audit) Regulations, 2003. Projects are categorised as low, medium or high risk, and the regulations were amended in 2019 to simplify and make the EIA licensing process faster by providing that a proponent of a **low or**

medium risk project is required to prepare and submit to NEMA a Summary Project Report of the likely environmental impacts of the project, and where the Authority considers that the proposed project is not likely to have any significant adverse environmental impact, it shall exempt the proponent from submitting a comprehensive project report and issue the proponent with an approval to proceed with the project.

An important feature of EIA law in Kenya is that all licensing authorities under any law in force in Kenya are prohibited from issuing a licence for any project for which an EIA is required, unless the applicant produces to the licensing authority an EIA licence issued by NEMA.

EIAs in Kenya can be challenged by anyone who is dissatisfied with the outcome of the assessment or who believe that the process was not conducted in accordance with the applicable laws and regulations. This is done by filing an appeal with the NET.

7. What is the framework for determining and allocating liability for contamination of soil and groundwater in your jurisdiction, and what are the applicable regulatory regimes?

The framework for determining and allocating liability for contamination of soil and groundwater is governed by the Environmental Management and Coordination Act. NEMA has the authority to investigate incidents of soil and groundwater contamination. Any person who causes or contributes to the contamination of soil or groundwater is liable for any damages that result from the contamination in accordance with the polluter pays principle, which is one of the principles applied by the Environment and Land Court in making its decisions on allocating liability.

In addition to the EMCA, there are several other sectoral regulatory regimes that apply to soil and groundwater contamination in Kenya. The Water Act, 2016 regulates the use of water resources in Kenya and outlines instances where permits are required, including for discharge of a pollutant into any water resource. The Act also mandates the Water Resources Authority to impose requirements or prohibit conducts or activities for the conservation of ground water. Other laws such as the Public Health Act of 2017 also regulate the handling and disposal of hazardous substances, including those that may contaminate soil and groundwater.

8. Under what circumstances is there a

positive obligation to investigate land for potential soil and groundwater contamination? Is there a positive obligation to provide any investigative reports to regulatory authorities?

In real estate/land transactions, buyers have the obligation to satisfy themselves as to the suitability of their purchase under the caveat emptor principle, and may as part of their due diligence, investigate land for potential soil and groundwater contamination. There is no obligation to provide an investigative report to regulatory authorities in this instance.

Additionally, a party that is an owner of premises or the operator of a project for which an EIA study report has been made is required to submit annual reports to the Authority to assess compliance. As such, and in line with EIA licence conditions, the party may be obliged to investigate the land for any potential contamination to enable the submission of accurate and conclusive reports to the Authority.

9. If land is found to be contaminated, or pollutants are discovered to be migrating to neighbouring land, is there a duty to report this contamination to relevant authorities?

Where land is found to be contaminated or pollutants are discovered to be migrating to neighbouring land, there is a general duty to report this contamination of land or migration of pollutants to relevant authorities. This is implied from the constitutional obligation to conserve and protect the environment which is a duty imposed on everyone.

More explicitly, the Environment Management and Coordination Act provides that in the case of discharge of hazardous substances, chemicals and materials or oil into the environment, the owner or operator of a production or storage facility, motor vehicle or vessel from which a discharge occurs shall mitigate the impact of the discharge by giving immediate notice of the discharge to NEMA and other relevant Government officers.

Reporting on demand is also provided for under the Environment Management and Coordination Act, for example in the case of owners or operators of irrigation project schemes, sewerage systems, industrial production workshops or any other undertaking that may pollute, who must submit accurate information about the quantity and quality of such effluent or other pollutant,

upon demand by NEMA.

10. Does the owner of land that is affected by historical contamination have a private right of action against a previous owner of the land when that previous owner caused the contamination?

Generally, an owner of land is required to carry out due diligence and find out all material facts about the land prior to making its purchase. The owner of land that is historically affected by contamination may however have a right of action against a previous owner of the land if the previous owner caused the contamination and used misrepresentation or fraudulent claims to transfer the land to the current owner. The burden of proving that the previous owner caused the contamination and made misrepresentations of this fact in its transfer of the land rests with the owner of the affected land. The owner may seek redress in the High Court seeking compensation for any losses or damages suffered because of the contamination.

11. What are the key laws and controls governing the regulatory regime for waste in your jurisdiction?

The key law and control governing the regulatory regime for waste is the Sustainable Waste Management Act, 2022, which promotes the right to a clean and healthy environment and provides for certain fundamental principles to waste management. These include the precautionary principle, polluter pays principle, take-back systems, extended producer responsibility, payment for ecosystem services and zero waste principle. The Act is of recent enactment and is in the process of operationalization with critical regulations necessary thereunder yet to be passed.

The Environmental Management and Coordination Act establishes NEMA as the primary regulatory agency responsible for enforcing environmental laws in Kenya, including those related to waste management. Waste Management Regulations operationalized under Environmental Management and Coordination Act provide detailed provisions for the management of various types of waste, including hazardous waste. The regulations also set out the requirements for waste treatment and disposal facilities, including licensing and operating standards. Kenya's EIA regulations also have a bearing on waste management as they require developers to conduct an EIA before undertaking any activities that may have significant environmental impacts, such as activities involving the construction of

waste management facilities.

In addition to these laws and regulations, Kenya has ratified international agreements related to waste management, including the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, which forms part of Kenya's laws as set out in the Constitution.

12. Do producers of waste retain any liabilities in respect of the waste after having transferred it to another person for treatment or disposal off-site (e.g. if the other person goes bankrupt or does not properly handle or dispose of the waste)?

Under Kenyan law, producers of waste are liable for the disposal of the waste they have produced. This includes taking steps to ensure that the waste is properly treated and disposed of. The Environmental Management and Co-ordination (Waste Management) Regulations, 2006, allow the waste generator to transfer the responsibility for the collection, segregation, and disposal of the produced waste through transferring such waste to a person who is licensed to transport and subsequently dispose of such waste.

The licensed waste transporter is obligated to ensure that the collection and transportation of the waste is conducted in a manner that will not cause scattering, escaping and/or flowing out of the waste, and to ensure that they collect waste from the designated area and to deliver the same to the designated storage or disposal site. Provided the waste generator can show a contractual agreement between themselves and the licensed waste transporter, liability remains with the licensed waste transporter even where the transporter goes bankrupt or does not properly handle or dispose of the waste.

13. To what extent do producers of certain products (e.g. packaging/electronic devices) have obligations regarding the take-back of waste?

Producers of certain products have obligations regarding the take-back of waste through the Extended Producer Responsibility (EPR) principle. This responsibility is set out in the Sustainable Waste Management Act, 2022 that provides that every producer shall bear extended producer responsibility obligations to reduce pollution and environmental impacts of the products they introduce into the Kenyan market and waste arising therefrom.

Producers may fulfil their extended producer responsibility obligations individually or collectively in a compliance scheme and the Act mandates the Cabinet Secretary to two make regulations on extended producer responsibility and there are under development Draft EPR Regulations which set out the following products and packaging as subject to EPR regulations:

- Packaging for non-hazardous products (plastics, papers, aluminium, composite, glass and carton).
- Hazardous products' packaging (industrial chemicals, oil and lubricants, pharmaceuticals, agrochemicals, veterinary, paints and solvents) and agricultural films.
- Electrical, Electronic Equipment, Mercury Auto Switches, thermostats, Battery and Accumulators.
- End of life motor vehicles, automobiles, aircrafts, locomotives.
- Packaging items (plastics, glass, paper, cardboard), furniture (except wooden, metallic), rubber and tyres.

Producers responsible for the plastic waste stream have already established a take back scheme for PET bottles and polythene bags, with Producer Responsibility Organizations in place for these schemes. This follows the ban on the manufacture, sale, export and importation of plastic carrier bags in Kenya in 2017, after which, manufacturers, importers or users exempt from the ban were obligated to develop and maintain plans for supporting the collection and recycling of their plastic waste.

14. What are the duties of owners/occupiers of premises in relation to asbestos, or other deleterious materials, found on their land and in their buildings?

The duties of owners/occupiers of premises in relation to asbestos and other deleterious materials found on their land and in their buildings are governed by the Occupational Safety and Health Act of 2007, the Environmental Management and Coordination Act of 1999, and the regulations and guidelines issued by NEMA as set out below:

- The Occupational Safety and Health Act of 2007 imposes a general duty on employers to ensure the safety and health of their employees, including protecting them from exposure to hazardous substances such as asbestos. This includes taking steps to identify and manage the risks associated with

asbestos in the workplace, such as conducting asbestos surveys and developing an asbestos management plan.

- Under the Environmental Management and Coordination Act, owners and occupiers have a responsibility to ensure that the use, handling, storage, and disposal of asbestos does not pose a risk to human health and the environment. The Act empowers the NEMA to investigate and control releases of hazardous materials and they have the authority to take action to prevent or mitigate any harm to human health or the environment caused by such materials.
- NEMA has also issued guidelines for the management of asbestos which owners/occupiers of premises are expected to comply with. These guidelines set out the requirements for identifying, managing and disposing of asbestos, including the requirement to conduct an asbestos survey, to identify asbestos containing materials, and the requirement for an asbestos management plan. Any changes to the property that might disturb asbestos containing materials (such as renovations) must be reported to NEMA for the relevant action to be taken.

15. To what extent are product regulations (e.g. REACH, CLP, TSCA and equivalent regimes) applicable in your jurisdiction? Provide a short, high-level summary of the relevant provisions.

Kenya's chemicals management regime provides detailed provisions for the importation, use, and disposal of chemicals in Kenya. It also establishes a registration and licensing system for importers and manufacturers of chemicals and sets out the requirements for the labelling and packaging of chemicals.

Relevant laws include the Food, Drugs and Chemical Substances Act which prohibits sales of certain chemical substances as well as prohibiting the labelling, packaging, treating, processing, selling or advertising any chemical substance in a manner that is false, misleading or deceptive as regards its character, value, quality, composition, merit or safety. The Pest Control Products Act relates specifically to the management of pest control products and together with its regulations, makes provision for the registration, labelling advertising and packaging, importation and exportation and disposal of these products. The Act establishes the Pesticides Control Board as the regulatory agency responsible for enforcing the regulations.

In addition to these laws and regulations, Kenya is also a party to international agreements related to the management of chemicals. Kenya has ratified the Basel, Rotterdam, Stockholm, Montreal and Minamata conventions which form part of Kenya's laws and provide a framework for the importation, use, and disposal of chemicals in the country.

16. What provisions are there in your jurisdiction concerning energy efficiency (e.g. energy efficiency auditing requirements) in your jurisdiction?

The Energy Act 2019 provides the legal framework for the promotion of energy efficiency. The Act establishes the Energy and Petroleum Regulatory Authority (EPRA) as the primary regulator of the energy sector in Kenya, including the promotion of energy efficiency. EPRA is empowered to set standards and guidelines for energy efficiency in various sectors, including buildings, appliances, and industrial processes. EPRA is also responsible for issuing energy performance certificates for buildings and enforcing compliance with energy efficiency standards.

An important regulation on energy efficiency is the Energy (Energy Management) Regulations, 2012 which aim to encourage the use of energy-efficient technologies and practices through the establishment of energy management systems and the development of energy-efficient technologies and require the owner or occupier of industrial, commercial and institutional facilities using any form of energy to carry out an energy audit of the facility to be undertaken by a licensed energy auditor at least once every three years, and have the audit submitted to EPRA for approval.

17. What are the key policies, principles, targets, and laws relating to the reduction of greenhouse gas emissions (e.g. emissions trading schemes) and the increase of the use of renewable energy (such as wind power) in your jurisdiction?

Policies, principles, targets, and laws relating to the reduction of greenhouse gas (GHG) emissions and the increase of the use of renewable energy in Kenya include the Climate Change Act of 2016, which is the principal law enhancing responses to climate change by mainstreaming them into development, planning, decision making and implementation, to provide for mechanisms and measures for achieving low carbon climate development. It prescribes a five-year National

Climate Change Action Plan that outlines Kenya's strategies for addressing climate change, including the reduction of GHG emissions and the promotion of renewable energy. There is also in place a National Energy Policy, 2018 and the Energy Act of 2019 which facilitate increased uptake of renewable energy with the aim of realizing Kenya's commitment to 100% clean energy by 2030.

Kenya's overarching low-carbon target is set out in the country's Updated Nationally Determined Contribution (NDC) submitted to the UNFCCC. It sets out a target to reduce GHG emissions by 32% by 2030 relative to the BAU scenario of 143 MtCO₂eq and in line with Kenya's sustainable development agenda and national circumstances. The timeframe for implementation of the NDC is up to 2030, with milestone targets at 2025.

18. Does your jurisdiction have an overarching "net zero" or low-carbon target and, if so, what legal measures have been implemented in order to achieve this target.

Kenya has an overarching low-carbon target of reducing greenhouse gas emissions by 32% by 2030, relative to the BAU scenario of 143 MtCO₂eq, as set out in the country's Updated Nationally Determined Contribution.

Examples of legislative measures to meet the target include amendments to the Income Tax Act in 2022 to include a tax incentive in the form of an income tax reduction for a company operating a carbon market exchange or emission trading system, that is certified by the Nairobi International Financial Centre Authority. The reduced tax rate is set at 15% for the first 10 years from the year of commencement of the company's operations, significantly lower than the ordinary corporate tax rate of 30% currently applied in Kenya.

19. To what extent does your jurisdiction regulate the ability for products or companies to be referred to as "green", "sustainable" or similar terms? 9.3 To what extent does your jurisdiction regulate the ability for products or companies to be referred to as "green", "sustainable" or similar terms? Who are the regulators in relation to greenwashing allegations?

Kenya has no explicit legal framework on greenwashing. However, different regulations governing relevant sectors generally obligate parties to ensure they do not

misrepresent facts or make false statements or disclosures as relates their actions, services or products. These obligations have a bearing on the use of "green", "sustainable" or similar terms for products or companies.

For example, Section 55 of the Competition Act, 2010 considers it an offence when a party makes false or misleading representations relating to a product's standard, quality, approval, performance characteristics, among others. The primary regulator in this case is the Competition Authority.

The Consumer Protection Act, 2012, in section 12, terms the making of false, misleading, or deceptive representation as unfair practices. Examples include false, misleading, or deceptive representations of performance characteristics, approval, standard, quality, grade, style or model among others. Section 15 subsequently prohibits such unfair practices. Further, section 84 empowers a consumer to commence action in court in instances of violation of their rights under the Act.

The *Nairobi Securities Exchange, ESG Disclosures Guidance Manual*, 2021 makes it mandatory for all listed companies in Kenya to report on, among other ESG topics, environmental compliance, and emissions (carbon footprint assessment). Such reports are to be guided by the prescribed principles which include accuracy that involves reporting information that is factually correct and sufficiently detailed. The Capital Markets Authority is the regulator in this instance.

More generally, the Environmental Management and Coordination Act, 1999 provides that misleading or giving wrongful information to an environmental inspector is an offence. Fraudulently making false statements in an environmental impact assessment report is also considered an offence. It is also an offence if a party fraudulently makes false statements in any records it is supposed to keep. Withholding information or providing false information about management of waste is also an offence. The primary regulator in these instances is the National Environmental Management Authority.

20. Are there any specific arrangements in relation to anti-trust matters and climate change issues?

The primary legislation governing competition in Kenya is the Competition Act, 2010 and it establishes the Competition Authority of Kenya (CAK) as the responsible entity for enforcing competition law and promoting fair competition in the country. The CAK has the authority to

investigate and act against companies that engage in anti-competitive practices, such as price fixing, bid rigging, and market allocation.

The Competition Act outlines practices that are considered as anti-competitive but makes no explicit mention of climate change as it relates to anti-trust matters. Whereas the Constitution of Kenya, 2010, in article 69 (2) encourages cooperation between parties in discharging their duties to conserve the environment and ensure ecologically sustainable development and use of natural resources, however the competition law framework contains no specific arrangements that permit exceptions to anti-trust in relation to climate change issues.

21. Have there been any notable court judgments in relation to climate change litigation over the past three years?

There has been one notable climate judgement in Kenya, relating to the challenge of an EIA licence for a coal project in coastal Kenya. This was in the case of *Save Lamu & 5 others v National Environmental Management Authority (NEMA) & another [2019] eKLR* which concerned the proposed construction of a coal-fired power plant in the coastal town of Lamu, Kenya, and the potential environmental impacts of the project.

The case was brought before the National Environmental Tribunal by plaintiffs who included environmentalists, local residents and community representatives, seeking to challenge the decision of the National Environmental Management Authority (NEMA) to grant an Environmental Impact Assessment (EIA) license for the proposed power plant. The Tribunal held that NEMA had failed to comply with the law when issuing the EIA license for the proposed power plant, having failed to properly consult with local communities. The project had also not adequately assessed the potential environmental impacts of the project including the climate impacts. As such the Tribunal ordered NEMA to revoke the EIA license issued for the project and to undertake a new, more comprehensive, and participatory EIA process, in compliance with the EMCA and its regulations.

There is currently an ongoing climate change petition (*Legal Advice Centre T/A Kituo cha Sheria & Anor V Attorney General and 7 Others (Iten ELC Petition No. 007 of 2022)*) filed on behalf of members of Ilchamus and Tugen communities living on the shores of Lake Baringo in Kenya who assert that they are victims of climate change related flooding, which has caused massive displacement and loss of life and property. The

petitioners allege violation of their human rights under the Constitution and seek to enforce climate change duties of public officials under the Climate Change Act. The Environment and Land Court (ELC) allowed an application by the Petitioners requesting the Chief justice and the President of the Supreme Court of Kenya to empanel a three judge ELC bench to hear the matter, and the matter is currently before the court.

22. In light of the commitments of your jurisdiction that have been made (whether at international treaty meetings or more generally), do you expect there to be substantial legislative change or reform in the relation to climate change in the near future?

Kenya has made commitments to reduce its greenhouse gas emissions in line with requirements of the Paris Agreement, which the country has ratified. To meet its emission targets, Kenya intends to utilize market and non-market mechanisms, and the co-operative approaches set out in Article 6 of the Paris Agreement are critical. There is likely to be substantial legislative change in the short to medium term as Kenya clarifies its carbon markets strategy and lays out the legislative provisions necessary to actualize the country's sustainable involvement in the global carbon markets while ensuring it meets its NDC emission reduction goals.

23. Has the energy crisis/global events resulted in any impact on environmental regulations and/or change in approach to environmental and climate change policy?

The energy crisis and global events have had an impact on the national approach to environmental and climate change policy in Kenya, encouraging a greater focus on less reliance on fossil fuels and much greater investment in renewables. Government has made a commitment to 100% clean energy by 2030 and there are various steps that have been taken in this regard. Notably, government has rolled out policies to encourage the use and production of electric vehicles. The government targets to increase the uptake of electric vehicles to account for 5% of all registered vehicles in the country by 2025 and ensure all public building include charging stations. There is also under development a national electric mobility policy. The government has further introduced fiscal incentive proposals for electric vehicles, which includes a plan to zero-rate electric vehicle tax. A special e-mobility tariff has also been proposed to

influence the demand and growth for e-mobility with consumption of between 200 and 15,000-kilowatt hours being priced at a proposed Sh17 per kWh, lower than the ordinary domestic tariff proposed at Sh21.68 per unit. In the 2019-20 budget, the government reduced the excise duty on electric vehicles from 20% to 10% to encourage their importation.

24. To what extent can the following persons be held liable for breaches of environmental law and/or pollution caused by a company: (a) the company itself; (b) the shareholders of the company; (c) the directors of the company; (d) a parent company; (e) entities (e.g. banks) that have lent money to the company; and (f) any other entities?

A Kenyan company will be held liable for breaches of environmental law and/or pollution caused by it, although a director of such a company may also be liable if such director had knowledge of the commission of the offence and he did not exercise due diligence, efficiency and economy to ensure compliance with the Environmental Management and Co-ordination Act.

Kenya recognises a company as having separate legal personality and therefore shareholder liability will only arise in limited circumstances where there the court is satisfied that the company is being used as a device and a sham to perpetuate an illegality.

It is unlikely for entities that have lent money to the company or other entities to bear the company's liabilities unless the company commits those offences as an agent or servant of the lender or other entities.

25. To what extent can: (a) a buyer assume any pre-acquisition environmental liabilities in an asset sale/share sale; and (b) a seller retain any environmental liabilities after an asset sale/share sale in your jurisdiction?

A buyer assumes pre-acquisition environment liabilities of the target company or group in a share sale although the parties can contractually allocate risk between them to limit the buyer's liability. In an asset sale the buyer assumes the liabilities related to what is being purchased and it is possible to structure the transaction to exclude the purchase of certain undesirable assets or liabilities.

The seller will usually not retain liability in a share sale except to the extent agreed between the seller and the buyer. On the other hand, in an asset sale the Environmental (Impact Assessment and Audit) Regulations, 2003 provide that both the seller and the buyer remain liable for all existing liabilities (although there is no prohibition in contractually allocating the risk as they deem appropriate) in relation to a license that is to be transferred as part of the sale but the seller is not responsible for any future liabilities.

26. What duties to disclose environmental information does a seller have in a transaction? Is environmental due diligence commonplace in your jurisdiction?

A seller is generally not under any duty to disclose environment information in a transaction. The principle of caveat emptor (i.e., "let the buyer beware") applies, although disclosures may be made by the seller against warranties that are negotiated in the transaction. Environmental due diligence is commonplace in Kenya particular for sectors whose activities may have material effects on the environment such as manufacturing, mining or oil and gas.

27. What environmental risks can be covered by insurance in your jurisdiction, and what types of environmental insurance policy are commonly available? Is environmental insurance regularly obtained in practice?

Environmental insurance services available in Kenya include environmental impairment liability, covering third-party bodily injury; third-party property and environmental damage; and clean-up costs for pollution conditions, both on site or while migrating from site. 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.

28. To what extent are there public registers of environmental information kept by public authorities in your

jurisdiction? If so, what is the process by which parties can access this information?

Public authorities, within the environmental sector, are responsible for maintaining public registers of environmental information, including information on pollution, hazardous substances, waste, and conservation areas. The primary agency responsible for this is the National Environment Management Authority (NEMA) as well as other relevant sectoral agencies such as Kenya Forest Service, Kenya Wildlife Service and Kenya Coast Guard Service etc.

The public can access this information in various ways, including online as some of the public register of environmental information is available on the NEMA's website, as well as other sectoral agencies; Through written request whereby the public can make a written request for access to environmental information held by public authorities. NEMA, as well as other sectoral agencies, have a legal obligation to provide this information within a reasonable time frame; and through physical visit to the offices of NEMA and other sectoral agencies to access the environmental information.

29. To what extent is there a requirement on public bodies in your jurisdiction to disclose environmental information to parties that request it?

Public bodies have a legal obligation to disclose environmental information to parties that request it in accordance with the Constitution of Kenya Environmental Management, the Access to Information Act of 2016, and the Environmental and Coordination Act (EMCA) of 1999.

Article 35 of the Constitution of Kenya provides for the right to access information and the Access to Information Act operationalizes this constitutional provision. The Act sets out the procedures for making a request for information and the grounds on which a request can be refused. Denial of access may be on grounds such as commercial sensitivity, if the information is the subject of legal proceedings, or for the sake of national security.

It's important to note that certain information may be withheld from the public on the grounds of confidentiality, national security, or other legal considerations, such as business confidentiality. Additionally, there may be a fee for access to certain information and it's important to ensure that the information is being requested for legitimate purposes. The public bodies are required to respond to the requests within a reasonable time frame and should also

provide the requested information in an accessible format.

30. What impact, if any, has COVID-19 had in relation to environmental regulations and enforcement in your jurisdiction?

The COVID-19 pandemic has had a significant impact on environmental regulations and enforcement in Kenya, as it has in many other countries around the world.

One of the main impacts of the pandemic on environmental regulation and enforcement in Kenya has been the need to prioritize public health and safety over other considerations, including the enforcement of certain environmental regulations. Governments and regulatory agencies around the world have had to shift their priorities and resources to address the immediate public health crisis.

With that in mind, civil construction works that were commissioned for the construction of more healthcare facilities and the expansion of existing ones were temporarily excluded from certain environmental compliance and this was assessed to be site-specific and temporary. Considering the urgency, the same were exempt from the process of seeking the environmental approvals before construction began as would ordinarily be the case.

Notably the Ministry of Environment and Forestry published a policy paper on *Post Covid - 19 Recovery: Towards a Resilient, Climate Aligned Post Covid-19 Recovery* in Kenya, which outlines the country's plans for various sectors and making sure the recovery plan works to build the country's resilience to effectively operate during moments of crisis including health and climate crisis.

31. Have there been any significant updates in environmental law in your jurisdiction in the past three years? Are there any material proposals for significant updates or reforms in the near future?

Significant updates in environmental law in Kenya over the past three years include an increased move by county governments to develop their environment related legislation including the development of county climate change laws. At the national level, there are several draft regulations and policies that are in the pipeline that make material proposals for reforming the environmental management regime. These include:

- Regulations on the management of chemicals such as the draft Environmental Management and Co-ordination (Toxic and Hazardous Chemicals and Materials Management) Regulations, 2019 which mandates the National Environment Management Authority (NEMA) to classify toxic and hazardous industrial chemicals and materials and/or their mixtures. Subsequently, any person or firm who intends to import, export, manufacture, distribute or supply such chemicals or materials shall apply for its registration and must also be licensed by the NEMA. The regulations also require parties to appropriately label the chemicals or materials while storing, distributing or selling them. Buttressing these regulations is the draft National Chemicals Policy, 2022 that seeks to promote sound management of chemicals for sustainable development in Kenya. The expected outcome is the establishment of national and regional management systems of chemicals in Kenya for the protection of human health and environment. There is also under discussion a draft Pest Control Products Bill, 2022 which aims to regulate the importation, exportation, manufacture, acquisition, distribution, advertising, use and disposal of pest control products in a bid to safeguard human health and the environment from risks associated with such products.
- In the area of energy efficiency, a regulation to watch is the Draft Energy (Energy Management) Regulations, 2022. These regulations apply to owners of any designated industrial, commercial, and institutional facilities using any form of energy mandating them to develop an energy management policy which is to be submitted to the Energy and Petroleum Regulatory Authority for approval before implementation among other obligations regulations intend to increase of the interval for the conduct of energy audits from once in every three years to once in every four years, providing owners of designated facilities more time for implementation of their energy savings plans.
- With regards to climate change, the proposed draft Climate Change (Duties and Incentives) Regulations 2021 place specific climate obligations on public and private entities, whilst the draft Climate Change (Monitoring, Reporting and Verification) Regulations 2021, provide a framework for monitoring, reporting, and verifying greenhouse gas (GHG) emissions; mitigation and adaptation actions; and climate change enablers such as climate finance, technology development, and transfer and capacity building that is currently not catered to in such detail in the existing legal and regulatory framework for climate change.

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