



Final recommendations to enact legal reforms for REDD+ implementation in Kenya



KENYA REDD+ ANALYTICAL SERIES - ISSUE #3
SEPTEMBER 2013 - ANNEX II



Empowered lives.
Resilient nations.



The Ministry of Environment, Water and Natural Resources is vested with the Government mandate to monitor, protect, conserve and manage the environment and natural resources. This mandate is discharged through specialized agencies including the National Environment Management Authority (NEMA), Kenya Meteorological Department (KMD), Kenya Forest Service (KFS) and the Kenya Forestry Research Institute (KEFRI). The Directorates of Environment and Natural Resource based at the Ministry headquarters provide the required policy guidance. Two Departments have been established within the Ministry for efficient discharge of responsibilities; the State Department of Environment and Natural Resources and the State Department of Water. Climate Change response Programmes, including REDD+ are coordinated from the State Department on Environment and Natural Resources.

UN-REDD PROGRAMME



The UN-REDD Programme is the United Nations collaborative initiative on Reducing Emissions from Deforestation and forest Degradation (REDD+) in developing countries. The Programme was launched in 2008 and builds on the convening role and technical expertise of the Food and Agriculture Organization of the United Nations (FAO), the United Nations Development Programme (UNDP) and the United Nations Environment Programme (UNEP). The UN-REDD Programme supports nationally-led REDD+ processes and promotes the informed and meaningful involvement of all stakeholders, including Indigenous Peoples and other forest-dependent communities, in national and international REDD+ implementation.

Final recommendations to enact legal reforms for REDD+ implementation in Kenya

TABLE OF CONTENTS

- 1. Introduction 1
- 2. Recommendations 2
 - 2.1. Linking land-use law and sustainable development in Kenya 2
 - 2.2. Securing a land-tenure system for REDD+ in Kenya..... 2
 - 2.3. Harmonizing REDD+ laws and policies..... 3
 - 2.4. Reforming the institutional framework..... 4
 - 2.5. Defining carbon rights and benefit sharing in REDD+..... 5
 - 2.6. Dealing with legal, policy and institutional barriers to REDD+ implementation 6
 - 2.7. Further recommendations for continuing legal reforms 7
- 4. Conclusion..... 9

1. Introduction

A legal framework for Reducing Emissions from Deforestation and Forest Degradation (REDD+) needs to address diverse and complex issues. These issues are often scattered through various legislation that deals with diverse socio-economic policy concerns. This diffusion calls for harmonization and continuous updating of legislative frameworks. Such frameworks must necessarily address economic, environmental and social issues related to REDD+ in a coherent way, in line with human rights principles¹ and international environmental treaties and conventions (e.g. United Nations Framework Convention on Climate Change [UNFCCC], Convention on Biological Biodiversity [CBD], and United Nations Convention to Combat Desertification [UNCCD]).²

According to Kenya's REDD+ Readiness Preparation Proposal (R-PP), the readiness process will incorporate a strong legal framework that promotes investments and ensures clear definitions of carbon rights and effective REDD+ benefit-sharing arrangements. Well-defined land and property rights would also enable public or private payment for environmental services (PES). This recommendations report presents some of the essential issues that REDD+ legislative reforms in Kenya should immediately take into account.

-
- 1 Human rights are rights inherent to all us human beings, whatever our nationality, place of residence, sex, national or ethnic origin, colour, religion, language or any other status. We are all equally entitled to our human rights without discrimination. These rights are all interrelated, interdependent and indivisible. Universal human rights are often expressed and guaranteed by law, in the forms of treaties, customary international law, general principles and other sources of international law. International human rights law lays down obligations of governments to act in certain ways or to refrain from certain acts, in order to promote and protect human rights and fundamental freedoms of individuals or groups (Office of the High Commissioner for Human Rights - OHCHR).
 - 2 It is important to note that Article 2(5) of Kenya's Constitution decrees, "The general rules of international law shall form part of the law of Kenya," and Article 2(6) says, "Any treaty or convention ratified by Kenya shall form part of the law of Kenya..."

2. Recommendations

REDD+ issues are diverse and complex. This makes it difficult to present a succinct set of recommendations for REDD+ legislative reforms. Nonetheless, this report attempts to provide clear suggestions and options for legal reforms for REDD+ in Kenya. The report begins with the issue of land-use laws in relation to sustainable development in Kenya, as well as the convergence and harmony of REDD+ laws and policies. Also discussed are the adequacy of Kenya's institutional framework; carbon rights and benefit sharing in REDD+; transparency and accountability in REDD+ transactions; and continuing legal reforms in the forest sector.

2.1 Linking land-use law and sustainable development in Kenya

Land use is an important issue in REDD+. Human activities on land influence sustainable development a great deal, especially in economies like Kenya's, which are based on natural resources.³ There arises the challenge of balancing environmental conservation imperatives with the many competing land uses. Setting aside land for forests or biodiversity conservation means the land remains undeveloped and economic activities on the land are forgone. In Kenya, land in parks and reserves is used mainly for wildlife-based tourism, and forest land is used mainly for forestry and for gathering non-timber forest products. These types of land are always under pressure from other uses, especially agriculture. Despite the stated intention to transform into a newly industrializing, middle-income country by 2030, Kenya's economy remains agro-based.⁴ The Agricultural Sector Development Strategy for 2010–2020 reaffirms this fact by pointing out that “the agricultural sector is not only the driver of Kenya's economy but also the means of livelihood for the majority of Kenyan people”.⁵

The potential of REDD+ can be harnessed by strengthening and aligning land-use laws to the imperatives of sustainable development. The new land laws have not properly addressed tenure insecurity, especially on the community lands that host much of Kenya's forests. This is coupled with lack of clarity on who holds carbon rights and who are the potential beneficiaries of forest resources, such as REDD+ carbon finance. Most land-related laws were written years ago in vague and difficult to understand language. The institutional framework for managing land and land-based resources, like forests, is weak. These challenges are worsened by lack of a land-use policy that would guide the realization of a critical balance between the many competing land uses. They have led to continued degradation of land and land-based resources; frequent land-related violence; conflict between and duplication of duties among different institutions; and communities' continued marginalization and loss of livelihoods.

2.2 Securing a land-tenure system for REDD+ in Kenya

Land tenure is critical to REDD+ in a number of ways. It determines, *inter alia*, the extent to which the legal framework recognizes and protects forest-related tenure and carbon related rights; the extent to which the legal framework recognizes customary and traditional rights of indigenous peoples, local communities and traditional forest users; the consistency between formal and informal rights to forest resources; and the extent to which the legal framework provides effective means of resolving disputes by due process. Indeed, the Cancun Agreement on Climate Change, in Paragraph 72, requests parties to address, *inter alia*, land tenure issues. The challenge is addressing land tenure equitably and securely.

3 Morishima, A., 2007, Challenges of Environmental Law – Environmental Issues and their Implications to Jurisprudence in Chalifour, N. J., Kameri-Mbote, P., Lye, L. H. & Nolon, J. R. (Eds), Land Use Law for Sustainable Development, New York, Cambridge University Press.

4 Republic of Kenya, 2007, Kenya Vision 2030.

5 Government of Kenya, 2010, Agricultural Sector Development Strategy: 2010–2020, page xii.

In particular, the following land-tenure issues need to be addressed:

1. Securing tenure, especially in erstwhile trust lands and unalienated government land: Already the proposed Community Land Bill promises to address this issue by establishing land administration committees and community land boards to hold and manage community land on behalf of those communities. But until the discussions are finalized and the bill is passed in parliament, insecure tenure over community land will continue to hinder sustainable management and use of community land. This situation has direct implications for Kenya's REDD+ preparedness because many forests fall on community lands. This legislation, once enacted, will protect the rights of forest-dependent communities and facilitate their access, co-management and derivation of benefits from the forests.
2. Clarifying tenure under some laws: For instance, while the National Land Policy calls for repossession of "irregularly" acquired public land, existing laws — the Land Act, 2012 — do not tell how to repossess the land. Furthermore, there are no clear definitions of irregularly acquired land or bona fide ownership of land.
3. Defining "communities": Despite the fact that much of Kenya's forests are on community land, there is no agreed or clear definition of "community" or of "community land". It is not clear whether these refer to both communities of common descent and communities of common residence, or to only the latter. Such lack of clarity may hinder sustainable use of land and land-based resources such as forests. The Constitution of Kenya defines "communities" on the basis of ethnicity, culture or community of interest. While culture and ethnicity are intuitive, it is less clear what "community of interest" means. Yet this phrase might be the key to defining communities in a way that promotes national cohesion and co-existence.
4. Harmonizing laws on tenure: Many laws and policies relating to land and natural resources such as forests have evident gaps and are incoherent. For instance, the Forests Act is not aligned with the Constitution of Kenya, 2010, or the Land Act and the tenure categorization that they have established.

2.3 Harmonizing REDD+ laws and policies

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

Despite considerable effort and progress in improving forest governance, Kenya continues to face challenges in establishing a clear and coherent legal and policy framework for governance of REDD+ activities. The laws established under several statutes are not completely harmonious, because each of them considers the issue from a rather narrowly defined perspective, as opposed to a multi-sectoral and integrated one. The challenges to clarity and coherence of REDD+ related laws and policies are summarized as follows:

- The legislation relevant to the management of forests is inscribed under many different sectoral laws, leading to failure to address the cross-cutting environmental and conservation issues. The resultant inter-sectoral inconsistencies, duplications and conflicts have contributed to further loss of forests. The Environment Management and Coordination Act (EMCA), 1999, did not remove the edifice of sectoral environmental institutions created during the colonial era and inherited at independence
- Although EMCA, 1999, contains relevant provisions for promoting REDD+,⁶ it does not effectively address several REDD+ related issues. These issues include the development of a national inventory of anthropogenic

6 These include provisions for the establishment of air-quality standards together with emissions requirements (Part VIII), environmental impact assessment requirements (Part VI), environmental restoration orders and environmental conservation orders (Part IX).

emissions of greenhouse gases (GHG) by sources and removal of GHG by sinks; the development of a national framework for carbon finance; and access to environmentally sound technologies

- The Forests Act, the Water Act and the Wildlife (Conservation and Management) Acts give rise to jurisdictional overlaps among institutions that manage areas where forests are located.
- The National Environment Policy, 2012, has useful provisions for addressing the lack of clarity and coherence in legal and policy frameworks for environmental governance. However, this policy has yet to be adopted as a framework to govern the environment in Kenya.
- The existing laws and policies of forest governance do not clearly show the rules for access and use rights; for sharing of revenues between Kenya Forest Service (KFS) and other forest-sector actors; and legal holders of “carbon rights”.
- There is insufficient enabling legislation to give effect to the involvement and participation of non-state actors in decision making processes that relate to REDD+, including forest-dependent rural communities, civil society and the private sector, as required by the Constitution, the Forests Act and the Forest Policy. There is an urgent need to seize the opportunity of ongoing legal reforms for harmonizing the new Constitution and reviewing and updating the draft of the Forest Policy and the Forests Act to align them with REDD+'s needs.

2.4 Reforming the institutional framework

The success of REDD+ implementation will depend to a great extent on strong institutions with clear mandates and sufficient capacity to govern REDD+ activities. Kenya is replete with institutions whose mandates relate to REDD+. Key among these are the Ministry of Environment, Water and Natural Resources, Kenya Forest Service (KFS), Kenya Wildlife Service (KWS), Kenya Forestry Research Institute (KEFRI), National Museums of Kenya (NMK), county governments and educational institutions. Others are the non-state actors: non-governmental organizations (NGOs), professional associations and the private sector. The Forests Act, 2005, also established more institutions: forest conservation committees (FCCs) and community forest associations (CFAs). The Climate Change Secretariat (CCS), the National REDD+ Steering Committee, the Technical Working Group (TWG), the National REDD+ Coordinating Office (NRCO) and the REDD+ Component Task Forces and Local Conservancy Officers⁷ have all been proposed under the climate change response strategy (NCCRS) to specifically manage the REDD+ readiness and implementation processes.

The stability of these institutions is very important to operate effectively, deliver their mandates in the area of sustainable forest management (SFM) and consequently successfully implement REDD+. It is important to reform and support the relevant institutions by:

- improving resource and human capacities in forest governance institutions;
- promoting cooperation among the national agencies (the National Environmental Management Authority [NEMA], KWS, KFS and Ministry of Water) to support to the forestry sector;
- establishing coordination forums and committees among different county governments, as well as different administrative levels within a county. The establishment of these groups should be fast-tracked to avoid potential conflict between the national government and county governments over use and management of forest and implementation of REDD+;

7 Government of Kenya, 2010, *Revised REDD Readiness Preparation Proposal Kenya*. Submitted to the Forest Carbon Partnership Facility, Nairobi.

- strengthening institutional linkages between forestry research, education, administration and resource owners and improving knowledge management and cooperation on issues of interest to forest management, such as REDD+;
- undertaking in-depth studies and management of data and information about national inventories on forest areas, growth and yield; establishing criteria and indicators for effective forest governance evaluation; and agreeing on a common definition of “forests”, in order to promote REDD+;
- strengthening local-level forest governance institutions (such as CFAs and FCCs), which are still weak both in terms of financial capacity and ability to influence policy decisions regarding forest governance;
- devolving the structures of KFS to correspond to the county structure that has been operationalized under the Constitution of Kenya, 2010;
- clarifying the links between the National Land Commission and KFS to harmonize responsibilities of land management and its implications for forest governance and REDD+.

2.5 Defining carbon rights and benefit sharing in REDD+

Kenya’s new forest governance arrangements⁸ recognize and reassert the viability of all three tenure regimes, including community tenure. However, the delay in enacting tenure-related legislation and mechanisms has hindered the local communities’ role in managing and accessing the benefits of community forests. Unless such legislation and mechanisms are in place, the laws and policies may not reflect the realities on the ground, including the roles and potential benefits of various actors. For example, despite the distinct tenure regimes in Kenya, a good deal of land is still, in practice, managed according to a mix of formal and customary rules. There is active conflict between those asserting claims over other land under the old and new systems. Such complex tenurial systems make it difficult to identify beneficiaries and establish benefit-sharing systems.

As another example, the Forests Act established CFAs to manage community forests allocated by KFS. However, few CFAs have been set up to date, and the existing ones lack sufficient training and financial capacity to operate effectively. The lack of operational CFAs may hinder equitable REDD+ benefit sharing, especially with regard to forest communities. In addition, the private sector has recently become important to the forest sector. Other than establishing commercial plantations, a number of private companies have expressed interest in acquiring concessions of state plantations as provided for in the 2005 Forests Act. However, to date, no concession arrangements have been made, and the regulations governing them have not been finalized.

The allocation of financial benefits from REDD+ will not necessarily be linked to land tenure alone (Peskest, 2011), because the right to own or manage a forest does not necessarily confer a right to benefit from it. It is possible that in some countries carbon rights belong to the government even if communities own the land and forests. Government ownership means that communities will not benefit unless effective benefit-sharing mechanisms are in place. In other cases, emissions reductions will result from broad policy reforms rather than from interventions in specific locations involving a limited set of actors. Again, this requires consultations and agreements on benefit-sharing modalities among the many actors. According to Kenya’s R-PP,⁹ discussions on benefit sharing arrangements are underway among KFS, communities and the private sector. The potential benefits to be shared are access to firewood and other forest resources and participation in taungya system planting on plantations. In a few cases, KFS has offloaded all carbon rights to communities who have invested in

8 These arrangements include the 2010 Constitution of Kenya, the National Land Policy, the Forests Act and the Forests Policy of 2007.

9 Government of Kenya, 2010, *Revised REDD Readiness Preparation Proposal Kenya*. Submitted to the Forest Carbon Partnership Facility, Nairobi.

management and conservation of specific forest blocks. Consultations on benefit sharing between KFS and other actors are, however, generally protracted and likely to slow down the REDD+ process.

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

Kenya has not yet established a clear definition or allocation strategies for carbon rights, although this is listed in the R-PP as a priority issue. The R-PP lists the following as priorities, *inter alia*: defining a clear set of procedures and rules for carrying out carbon-credit generating activities and establishing transparent rules on the allocation of carbon rights.¹⁰ Such clear rules will lessen challenges for non-state actors, especially vulnerable people, to engage in REDD+ and help build the necessary infrastructure for managing national REDD+ activities in the future.

2.6 Dealing with legal, policy and institutional barriers to REDD+ implementation

Kenya is committed to the REDD+ readiness process and is participating actively in international REDD+ negotiations. It has a REDD+ Readiness Plan that outlines how it will develop its national strategy for participating in an evolving international REDD+ mechanism. Despite the country's progress and effort, legal and policy barriers to REDD+ implementation in Kenya remain. Firstly, the lack of a specific policy goal or national strategy for the REDD+ readiness and implementation processes is a challenge. Such a policy goal or action plan would provide the framework for effectively addressing REDD+ related issues: the development of national inventories of anthropogenic emissions of GHG in Kenya by source and removal of GHG by sinks; a national framework for carbon finance; and access to environmentally sound technologies.

Secondly, despite the ongoing land reforms, there tenure insecurity still exists, especially for community land. The proposed community land bill that promises to address the issue is yet to be finalized. The discussions should be finalized and the bill enacted in parliament to ensure that tenure insecurity does not hinder sustainable management and use of community land. This situation has direct implications for Kenya's REDD+ preparedness because a significant amount of forests fall on community lands. Closely linked to tenure is the lack of clarity of some tenure laws, such as the lack of a clear bona fide ownership of land under the different tenure regimes and the criteria for defining “communities” in relation to ownership of community land. Another obstacle is that the Forests Act does not categorize tenure in line with the Constitution of Kenya, 2010, and the Land Act and other related tenure categorization.

Thirdly, the laws relevant for forest governance and thus REDD+ are established under several statutes. Coherence among laws embracing the broad concept of sustainability is often a challenge. They sometimes overlap, are duplicated and conflict with one another. The draft of the National Environment Policy, 2012, has useful provisions that address the lack of clarity and coherence in the legal and policy frameworks for environmental governance. However, the Policy has not been adopted as a framework to govern the environment sector in Kenya.

¹⁰ Ibid.

Fourthly, despite an array of institutions charged with forest governance, there are many institutional challenges that, if unchecked, will hinder REDD+ implementation. For instance, there has been a considerable lack of mutual support and cooperation among national institutions charged with forest governance. This is partly a result of the lack of clarity and coherence of the laws that created these institutions.¹¹ With the entry of the devolved government structure, conflicts are also expected between the two levels of government, as well as between county governments. Another long-standing institutional challenge for forest governance in Kenya is availability of adequate funding and the pursuit of institutional mandates. Low funding has made the forest sector heavily reliant on donor funding, which is traditionally inconsistent because it is short-term and project-activity based.

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

2.7 Further recommendations for continuing legal reforms

Forest governance in Kenya has seen considerable efforts and progress in the past years. However, there are still some challenges and actions needed, especially with the emergence of REDD+ mechanisms.

- Fast track the revision of the Forest Policy to establish a clear direction for continued forest-sector reforms. The Forests Act should also be revised to be in line with the new Constitution and to give effect to the Forest Policy. The National Environment Policy should be finalized and adopted. The recommended areas for action in the legal, policy and institutional framework to ensure REDD+ success are: advocate and mobilize for inclusion of specific REDD+ provisions in the relevant laws and policies, starting with the ones that are currently under review e.g. the Forests Act, Forest Policy and National Environment Policy. In the long term, specific legislation to govern REDD+ implementation in Kenya should be put in place.
- Provide a legislative framework for public participation and the involvement of non-state actors — such as forest-dependent rural communities, civil society and the private sector — in the management of forests and other natural resources.
- Clarify the roles and mandates of all the forest sector institutions to avoid overlaps and incoherence. For instance, the laws should define the role of the Kenya Forest Service (KFS) in managing forests that fall on community land and the National Land Commission in promoting forest conservation. Indeed, the establishment of the Ministry of Environment, Water and Natural Resources provides an important opportunity for rationalizing institutional responsibilities and clarifying roles. To manage natural resources at the local level, the associations formed in respect of forests (CFAs) and water (water resource users associations [WRUAs]) could be merged in order to avoid duplicity, turf wars and neglect.
- Clearly define rules for access, use rights and revenue sharing among KFS and other forest-sector actors, like community associations and county governments. Also, clearly define who has legal rights to REDD+ benefits — now commonly referred to as “carbon rights”.
- Create rules for establishing and implementing Forest Management Agreements between KFS and other sector actors.

¹¹ For example, the Forests Act, 2005, created the KFS while the Water Act created the Water Resources Management Authority (WARMA). There is potential for conflict over management of forests gazetted both as water catchment areas under the Water Act and as forest reserves under the Forests Act.

-
- Establish a forest database and information sharing mechanism that includes an updated national forests inventory.
 - Provide a definition of forests through a participatory process.
 - Define Kenyan Criteria and Indicators (C&I) for sustainable forest management.
 - Finalize and enact legislation on community land in Parliament. The legislation should clearly define “community” and “community land”. The meaning of “community of interest”, foreseen in the Constitution, should also be clarified and defined in a way that promotes interethnic cohesion. Additionally, the Community Land Law should allow customary right holders of land to engage in REDD+ processes and protect their rights to carbon benefits sharing. The law should repeal or recommend a review of the Trust Land Act. It should also recognize the resilience of customary tenure and the role customary tenure can play in protection and conservation of forests.

3. Conclusion

It may be too early to develop specific legislation on REDD+ in Kenya, notwithstanding the myriad of legal, policy and institutional gaps, barriers and challenges to the design and implementation of REDD+ in Kenya. REDD+ has yet to acquire weight and to be accepted in Kenya's public policy realm, which would give it the momentum required for specific legislation. But there is considerable room and need to infuse REDD+ provisions into Kenya's diverse legislation and policies. A key opportunity exists in the ongoing legal and institutional reforms that are intended to align Kenyan laws with the new Constitution. Other opportunities for REDD+ exist in the legislative and policy processes intended to put the new constitution into operation. This is happening at both the national and county government level. The challenge is for REDD+-minded institutions to monitor these reforms and seize the opportunity to secure a REDD+ agenda in such laws and policies.

The current efforts to review and update both the draft of the Forest Policy and the Forests Act and to harmonize them with the new Constitution present the most formidable opportunity for integrating REDD+ legislative reforms with Kenya's legislation. A worthwhile and timely investment would be to support the REDD+ Coordination Office and Focal Point as they monitor legislative reforms and engage on REDD+ matters. Such support could also be extended to include the review and harmonization of the framework environmental law (the Environmental Management and Coordination Act, No. 8 of 1999), the draft of the Wildlife Bill, the draft of the Community Land Bill and the draft of the National Environment Policy. These policies are among the most critical for the future of Kenya's REDD+ legislative framework.

Ministry of Environment, Water and Natural Resources

NHIF Building, 12th floor
Ragati Road, Upperhill
PO Box 30216-00100
Nairobi, Kenya.

psoffice@environment.go.ke, communication@environment.go.ke

<http://www.environment.go.ke>

UN-REDD Programme Secretariat

International Environment House,
11-13 Chemin des Anémones,
CH-1219 Châtelaine, Geneva, Switzerland.

un-redd@un-redd.org

www.un-redd.org

Cover photo credit: ©FAO/Christena Dowsett

