SUMMARY OF THE FOREST CONSERVATION AND MANAGEMENT ACT, 2016

Introduction

The Forests Conservation and Management Act (FCMA), 2016 is the culmination of a review of the Forest Act, 2005 to realign with the Constitution and address emerging issues on forest conservation and management. The Act gives effect to Article 69 of the Constitution on environment and natural resources. It is the main statute governing all forests on public, community and private land.

The main features of this Act are: the inclusion of County governments in forest management and conservation; the introduction of benefit sharing arrangements and incentives to increase forest and tree cover, a national strategy to increase and maintain forest and tree cover to at least 10% of the total land area; the establishment of a national forest resource monitoring system and establishment of a Forest Management and Conservation Trust Fund. This summary provides some of the relevant points to note in each part of the Act.

PART I: Preliminary

Part I provides the definitions for terms used in the Act. It also sets out the general principles in forest management, namely: good governance; public participation and community involvement; consultation and co-operation between the National and County governments; the values and principles of public service such as transparency and accountability; protection of indigenous knowledge and intellectual property rights of forests resources; and adoption of international best practices.

Unlike the previous Forest Act (2005), the FCMA, 2016 expressly recognizes the need for a national forest policy to be developed and reviewed every 5 years in consultation with County governments among other relevant stakeholders. It also requires that a national forest strategy, be formulated every 5 years with the participation of relevant stakeholders. The strategy should contain among others, programmes for achievement and maintenance of at least 10% forest cover.
PART 11: Administration

Part II declares that the Kenya Forest Service (KFS)-a corporate semi-autonomous body- is responsible for the management of public forests in Kenya. The key functions of the KFS are to prepare and implement forest management plans, issue licences and permits for use of forest resources, establish benefit sharing arrangements, build capacity of County governments in forest extension services, prepare forest status and resource assessment reports, manage water catchment areas in relation to soil and water conservation, carbon sequestration and other environmental services, promote forestry education and training, and develop and enforce rules and regulations governing movement of forest resources.

The KFS is under the management of a board whose powers include: investing KFS funds, cooperating with other organizations undertaking similar functions to KFS and setting aside land for forestry research. The board will receive recommendations from a forest conservation committee on matters related to the conservation and utilisation of forests. The Act enables proper governance (including transparency and accountability) of KFS by setting minimum requirements for appointment of Board members.

County governments are required to implement national forest policies, manage all public forests in the counties, prepare annual reports informing on their role in forest management, promote afforestation activities in the counties, make joint agreements for management of forests, and offer extension services to community and private forest owners.

The Act also acknowledges the role of the Kenya Forestry College in providing forestry education and training, while the role of the Kenya Forestry Research Institute (KEFRI) is to prepare strategies for forestry research and development, conduct expert training courses, disseminate research findings, and participate in the development and monitoring of national forest standards.


Part III addresses sources of funds for the KFS. The sources include: national budgetary allocations, accrued funds in the course of operations, remunerations, gifts, donations and loans. The Act also provides for the establishment of a Forest Conservation and Management Trust Fund to promote and support forestry development initiatives and programmes such as
community forestry, payment for ecosystem services, trainings and afforestation activities. Sources of funds for the Trust fund will consist of national budgetary allocations, remunerations determined by the Cabinet Secretary for use of forests, income from investments made by the KFS board, designated funds or assets of KFS, grants, donations and gifts.

**Part IV: Conservation and Management of Forests**

Part IV classifies forests as public, community or private, as in the constitution. All public forests are under the management of the KFS. Community forests and private forests are registered by the KFS. The community forest owners can apply to County governments for technical advice and apply for loans from the Forest Conservation and Management Trust Fund for forest development.

Community forests or private forests that are within a water catchment, or located in an area of rich biodiversity and cultural significance or support an important industry may be declared a provisional forest if deemed mismanaged or neglected by the KFS board. Such a forest will be managed by the KFS in collaboration with the owner for a period of three years subject to review and will only revert to the owner when the KFS board is satisfied that it has been adequately rehabilitated. Part of a public forest may also be degazetted and become private land by the KFS if it enhances efficient management and protection of the forest or has equitable value with no adverse environmental effects. Similarly, the KFS may also purchase land suitable for a public forest or have an arrangement with the owner after public consultation. Community and private forests can be turned into nature reserves with compensation for the owners.

County governments are required to establish and maintain arboreta, green zones or recreational parks for use by residents of the counties. Moreover, County governments are required to ensure that housing developers make a provision for establishment of green zones at the rate of at least 5% of the total land area of any housing estate.

A forest owner is allowed to have joint management agreements with anyone for a period specified in the agreement. The Act also provides for the sustainable management of indigenous forests for their environmental services and socio-cultural significance. KFS has the responsibility of managing plantation for the production of wood and other forest products for commercial purposes. KFS may issue licences, concessions, contracts and joint agreements
with interested persons for the management of the forests. Concessionaires are required to protect and manage the forest areas in a sustainable manner. They are also required to provide a form of financial security referred to as an Environmental Protection Bond to cover environmental obligations. Public forests may also be co-managed by the KFS and any person, institution or organization through a competitive process. The consent for quarrying on forest land will only be issued in areas with no rare, threatened or endangered species, not in a catchment area, areas of no cultural significance, and for which an EIA has been carried out.

**Part V: Community Participation**

Part five has provisions for community participation in forest management through Community Forest Associations (CFAs). A member of a forest community may together with other members resident in the same area, register a CFA. The application provides a list of members, the constitution of the association, the associations financial regulations, the area of forest for which the association proposes to undertake conservation and management. The association also sets out the proposed use of forest resources, methods of biodiversity conservation, methods for the monitoring and protection of wildlife and plant populations and such other information required by the KFS. The CFAs are required to protect, conserve and manage the forest or part of a forest in accordance with an approved forest management plan. The CFAs are also entitled to forest user rights such as collection of forest products, ecotourism and education activities. Customary rights of forest communities are also be observed.

**Part VI: Incentives for increasing forest and tree cover**

The Act provides for benefit sharing of forest resources by investors with local communities in the form of infrastructure, employment, and the provision of educational and social amenities among others. The Act also provides tax and other monetary incentives to increase investment in forestry and address degradation. These incentives apply to capital goods imports, investments in efficient forest resource utilization, clean energy development, establishment of private forests and conservation areas as well as payment for ecosystem services. The Act also requires the observation of the national tree planting week and the International Day of Forests to increase forest and tree cover in the country.
Part VII: Licensing and trade in forest products

This part outlines the procedures for licensing and trade in forest products. The KFS can invite the private sector to take part in sustainable forest management through licenses, contracts, joint management agreements or concessions. Eligibility depends on the technical and financial capacities to enter into binding agreements with the KFS and undertake the proposed forestry activities. The Act requires that the KFS should publish in the Gazette, a chain-of-custody system for the verification of the origin of forest products from public, community and private forests and support its establishment at the County government level. Regulations for grading and valuation of timber and other forest products should also be set by the Cabinet Secretary in consultation with other stakeholders. The Act protects biodiversity by restricting the movement of forest products into or from the country.

Part VIII: Enforcement and Compliance

This part sets out the powers of KFS officers which include: demanding the production of an authority or license for an act committed in a forest or possession of a forest product for which authorization is required, arresting offenders, searching any person suspected of a forest offence, seizing and detaining livestock found roaming illegally in the forest, confiscating receptacles placed without authorization, assessing the conditions of private forests, and inspecting forest product dealers for illegally accessed products. Officers of the service above the rank of Sergeant Forest Ranger have the same powers conferred on a police officer under the Criminal Procedure Code and the National Police Service Act, 2011. Officers of the service with paramilitary training are allowed to use firearms to protect public forests.

Part IX Offences and Penalties

This Part lists the common prohibited forest activities and their penalties. The prohibited activities include: illegal harvesting of forest products, importation or exportation of forest produce, illegally marking forest produce, arson of a forest and introduction of exotic genetic material. Such offences are liable to a fine of up to 5 million shillings and imprisonment of up to 10 years or both.

According to the Act, disputes arising from forest conservation and management will first be handled by the lowest possible structure under the devolved system of government as set out
in the County Governments Act, 2012. Any matter left unresolved will be handled by the Environment and Land Court under the Environment and Land Court Act, 2011.

**Part X Miscellaneous**

Part 10 of the Act makes provisions for regulations to give effect to the Act. The regulations are for incentives and benefit sharing, licensing, regulating activities in public forests, protecting endangered and threatened species and enhancing community participation among others. This Act also aligns with the constitution by requiring that implementation be done in accordance with international treaties or agreements of which Kenya is signatory.

**Part XI Transitional Provisions**

The FCMA, 2016 repeals the Forest Act, 2005 and the Timber Act, 1972. Public forests in existence before commencement of the Act are to retain their status. Licences, contracts or agreements issued prior to effect of the Act will also remain in force, with limitations on outlawed activities. Employees of KFS and members of the board are also allowed by the Act, to continue holding office. Revisions are to be made for forest management plans and subsidiary legislation.

**The Schedules**

The first schedule outlines the provisions for tenure of office and conduct of business of the KFS Board. The second schedule has provisions for public consultation through a notice in the Gazette, at least two national newspapers and at least one Kenyan radio station. The third schedule provides a list of gazetted public forests in Kenya.

**Key Provisions introduced in the Forest Conservation and Management Act, 2016**

- The Act introduces **principles in line with the Constitution** such as good governance, public participation, cooperation between National and County governments, principles of public service in accordance with Article 232 of the constitution, protection of indigenous knowledge and intellectual property rights of forests resources; and international best practices in management and conservation of forests.
The categories of forests have changed in line with the Constitution. The categories are; public, community and private forests according to Article 62 of the constitution. Previously, they were categorized as state, local authority and private forests.

The Chief Conservator of Forests will be in charge of managing day to day operations of KFS. In the previous Act, KFS was managed by a Director.

A national forest policy to be developed and reviewed every 5 years in consultation with County governments among other relevant stakeholders. The National and County governments shall develop a comprehensive sectorial based policy elaborating how functions, institutions and resources will be managed between the two levels of government.

A public forest strategy to be formulated every 5 years with the participation of relevant stakeholders. It should contain programmes for achievement and maintenance of at least 10% forest cover.

A forest status report and resource assessment report to be prepared every 2 and 5 years respectively by KFS. A GIS database will also be maintained and updated regularly.

The Act provides for devolution of forest extension services to County Governments, which was previously the role of KFS staff. County governments will be able to offer technical advice to community and private land owners.

The new law requires KFS to have budgetary allocations for capacity building of County governments for forestry development.

The Act has reorganized functions of KFS and the board: the management of the KFS has the right to propose establishment of forests on public land; determine and alter boundaries of forests on public land, consider licences in relation to forest products and provide credit facilities and technical training for community-based forest industries. These were previously functions of the KFS board.

Establishment of a Forest Management and Conservation Trust Fund: The Trust Fund will support innovations and best practices in forest conservation and development including supporting programmes in community forestry; reforestation and afforestation; forestry extension; apprenticeships and vocational training and Payment for Ecosystem Services (PES). It will be managed by a board of trustees appointed by the Cabinet Secretary. The trust fund will be financed through monies appropriated by the National Assembly for purposes of the fund, finances levied upon forest beneficiaries, income from investments made by the KFS board, grants, donations, bequests or other gifts.
- **Reconstitution of the KFS board:** The KFS board is now made up of: the chairperson; the Principal Secretary (PS) responsible for forestry; the PS responsible for National Treasury; the Inspector-General of the National Police Service; the Director of KEFRI or their representatives; the Chief Conservator of Forests and four other persons nominated by the Forestry Society of Kenya; a national body representing CFAs; the forest industry; and the Council of Governors.

- **Reconstitution of the Forest Conservation Committee:** This committee will now include: a chairperson; the relevant County government Chief Executive responsible for forestry or a representative; a relevant forest officer in charge and three other persons nominated by the relevant CFAs, the forest industry and community social organisation respectively.

- The Act **introduces forestry functions of County governments,** which include: implementation of national policies on forest management and conservation; management of all forests on public land defined under Article 62(2) of the Constitution; preparation of annual reports on County activities related to forest management; promotion of afforestation activities in the county; advising and assisting communities and individuals in the management of community forests or private forests, and entering into joint management agreements with communities or individuals for the management of community forests or private forests. They may also make regulations in respect to any community forest in consultation with the Cabinet Secretary (CS).

- The Act requires **KEFRI to undertake research and development programmes that provide information and technologies for sustainable development of forestry and allied natural resources.** KEFRI will also advice the CS on **trees that need protection,** which previously was the role of the KFS board.

- Any person may petition for the **variation of public forest boundaries or revocation of public forests,** provided it has no adverse effects on the environment. In the previous Act, only KFS had the right to recommend.

- The Act has **new requirements for concessions on public land** including the requirement for both Environmental Impact Assessments (EIAs) and Strategic Environmental Assessments (SEAs), preparation of a management plan for the concession area that includes reforestation or replanting programmes, community user rights/benefits and provision of an Environmental Protection Bond.

- The Act provides **incentives for increasing forest and tree cover.** They include benefit sharing with local communities by forest investors, PES schemes, tax exemptions and other
fiscal incentives for capital goods imports, investments in efficient forest resource utilization, clean energy development and establishment of private forests and conservation areas.

- The Act has a provision for the observation of the national tree planting week and International day. The CS is expected to plan and execute related programmes.
- The new Act provides for private sector involvement in the sustainable management and utilization of forests. The KFS may invite the private sector to apply for permits, licences, contracts, concessions and joint forest management.
- The new Act provides for the registration of private forests to enable private forest owners to access or obtain technical advice regarding appropriate forestry practices. The private forest owners shall be eligible to apply for funds for development of their forests. In addition, they may apply for exception of payment of land rates and such other charges as may be levied in respect of the land on which the forest is established.
- The Act has a provision for establishment of a chain-of custody system for the verification of the origin of forest products from public, community and private. This system will be developed and implemented by the KFS and County governments.
- The Act requires establishment of a grading and valuation system for forest products by the CS in consultation with other stakeholders.
- The Act now requires the KFS to issue permits for imports and exports of forest products. There will also be a prohibition on trade of restricted forest produce.
- Some of the roles meant for the president will now be handled by a CS. For instance, the CS responsible for matters relating to firearms may, through the Inspector General, avail firearms to KFS to carry out its functions and the CS responsible for forestry can make a declaration of protected tree species.
- There are changes in penalties for illegal forest activities. Fines for offences such as tree poaching have increased from a maximum of KSh. 50,000 to 100,000. The prison term for crimes such as counterfeiting has reduced to a maximum of 3 years from 5. Fines and prison term for quarrying offences has increased to a maximum of KSh. 1 million and 2 years respectively. Penalties for offences like failing to comply with the provisions of the Act have decreased to a maximum of KSh 50,000 and 6 months from KSh 100,000 and 1 year. Offences such as introduction of invasive species in the country will require a fine of not more than KSh 3 million compared to the previous fine of KSh 5 million.
- The new Act has new provisions for handling forest-related disputes. Such disputes will initially be referred to the lowest structures in the County government (County
Governments Act, 2012). Unsolved matters will be referred to the National Environment Tribunal. Appeals will now be dealt with by the Environment and Land Court (Environment and Land Court Act, 2011). Previously such cases were dealt with through a petition of the high court.

- **The new Act repeals the Forest Act, 2005 and the Timber Act, 1972**

**Some contradictions within the FCMA, 2016**

- The Act states that the Chief Conservator of Forests will be in charge of the day to day management of the KFS (Section 14 (4), 29 (1b), 35 (2b), 50 (1) and 74. However, there are several mentions of a Director General: see Section 35 (2) (b); 50 (1) and 74.
- The Act states that public forests are vested in the KFS (Section 8 (a), 31 (1). However one of the functions of County governments is to manage all public forests under their jurisdiction (see 21 (b)).
- The Act classifies forests as public, community and private forests (30, 1). However, there are mentions of national forests and county forests (Section 62, 1; 65, c and 67, e).
- The Act states that the KFS is in charge of preparing management plans for all public forests (Section 8, b & 47, 2). However, County governments are also required to prepare management plans for public forests within their jurisdiction (Section 47, 3).
- The Act states that the Chief Conservator of Forests will supervise the implementation of management plans in public forests and County governments will supervise implementation of management plans in community and private forests (Section 47, 6). However, Counties are also charged with management of public forests (Section 21, b).