

COMPARISON OF THE FOREST ACT, 2005 AND THE PROPOSED FOREST BILL, 2012

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1. OVERVIEW

The Forest Act 2005 (The Act) was passed to include many things that were not in the previous Forest Act. These changes were introduced for better management and conservation of forest resources. The main changes introduced included:-

1. Management of all types of forests i.e. State forests, Local Authority forests, private farm forests and provisional forests;
2. Communities living next to forests (Community Forest Associations) and other stakeholders such as the Kenya Forest Service and those who own forests on their private farms were included in forest conservation and management;

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3. Ecosystem approach to forest management planning (i.e. managing forests together with all other living and non-living things found in the forest e.g water, animals, plants);
4. Provision of benefits to encourage wise use and management of forest resources;
5. The Minister in charge of forests was given power to make rules under the Forest Act e.g. the Charcoal Rules, Forest Harvesting Rules; and
6. The Kenya Forest Service (KFS) was first introduced in the Act.

The Forest Bill, 2012 (The Bill) was prepared following the coming of the new constitution which requires Parliament to make laws to give effect to the Chapters of the Constitution on natural resources as well as on devolution. Devolution is the transfer of some powers, functions and responsibilities from the national government to the County Governments. The following are the main elements of the Forest Bill, 2012.

1. The Bill explains the separation of function between the Department in charge of Forestry, the KFS, and County Governments.
Under the Bill, we now have the Department in charge of Forestry which takes the place of the Ministry of Forestry and Wildlife. The Department is in charge of making laws and policies, KFS is responsible for management and conservation of forests and forest resources on public land, the County Governments are responsible for the carrying out of laws and policies for forests and forest resources on community land and private land, the communities and private land owners are responsible for managing their forest resources themselves on community land and private land respectively. County forest conservation committees will also be established to replace Forest Conservation Committees.
2. The Bill encourages community participation in forest conservation and management through the strengthening of Community Forest Associations and the introduction of benefit-sharing arrangements.
3. Finally, the Bill has introduced a programme for the payment of environmental services e.g. carbon trading. This is to encourage communities to plant more trees and participate in forest management and conservation.

2. GUIDING PRINCIPLES AND VALUES

The Act does not set out these principles and values but the Bill has provided that State organs in the forest sector will be guided by the following principles and values in carrying out their functions:-

- a) Management of forests and forest resources shall be brought down to the lowest level possible which is the County level.
- b) Principles of good governance (being responsible for their acts, being fair to everyone, equal sharing of national resources, respect for human rights); full access to public information; and a participatory approach to forest conservation and management to

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ensure that communities, the private sector and civil society are involved in planning, implementation and decision making.

- c) Recognizing and supporting forest conservation and management as a way in which public and private land can be used.
- d) Sharing of the benefits from conservation and management of forests fairly among the people of Kenya.

These principles and values are important since the communities will be able to ensure that the concerned State organs follow them in carrying out their functions.

Article 70 of the Constitution allows a person to go to court if he feels that his environmental rights are being violated by another person or a State organ.

3. ADMINISTRATION

As earlier mentioned, the Bill hands down forest conservation and management to the County Government and the community. Therefore, there are more government agencies at national and county level that carry out various roles in forest resource management than there are in the Act.

3.1 The Department in Charge of Forestry

In the Act, a Minister heads the Ministry of Forestry and Wildlife. However, under the Bill, a Cabinet Secretary will head the Department in charge of forestry (the Department). Its work will be to make policies for conservation and management of forests and forest resources.

3.2 Office of the Regulator

This office is not in the Act but it has been established in the Bill as an office in the Department to set rules, values and guidelines that will guide KFS, County Governments and private forest owners in carrying out their duties in conservation and management of forests and ensure that they obey these rules and guidelines. The office has the power to choose what action will be taken in case of disobedience.

3.3 Kenya Forest Service

It is established both in the Act and the Bill to be responsible for the management of forests on public land. KFS is managed by a Board.

3.3.1 The KFS Board

In the Act, members of the Board are:-

- The Permanent Secretary in the Ministry of Forestry or a selected representative;
- The Permanent Secretary in the Ministry Water, or a selected representative;
- The Permanent Secretary in the Ministry of Finance or his selected representative;
- The Permanent Secretary in the Ministry of Local Authorities or his selected representative;

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- The Director of Kenya Wildlife Service;
- The Director General of the National Environment Management Authority;
- The Director of the Kenya Forestry Research Institute;
- The Director of Kenya Forest Service, who is the secretary; and
- Eight other people who are not public servants, appointed by the Minister as follows: –
 - a) One with at least 10 years experience in security and law enforcement;
 - b) A representative of the Kenya Forestry Society;
 - c) The rest are
 - Experts in forestry or the forestry industry or in a related scientific or educational field, or who are members of non-governmental organizations dealing with environmental or natural resource matters; or
 - People associated with one or more forest communities.

In the Bill the Board members include:-

- The chairperson appointed by the Cabinet Secretary;
- The director of conservation, department of forestry or his representative;
- The Chief Executive officer, National Land Commission;
- The Chief Executive Officer, Kenya Forestry Research Institute;
- The Principal Secretary, Local Government;
- Four other people appointed by the Cabinet Secretary and nominated by:
 - Forestry Society of Kenya,
 - National Association of Community Forestry,
 - Kenya Private Sector Alliance, and
 - NGO council from a national forest conservation NGO.

As required by the Constitution, not more than two thirds of these members should be of the same gender.

There is an opportunity for CFA representation to the KFS board under the Bill. The Bill has expressly stated that one person should be nominated by the CFA umbrella body, the National Association of Community Forestry.

3.3.1.1 Qualifications for the chairperson of the Board

This is not set out in the Act but the Bill requires that a person wanting to be the head of the Board should:-

- Meet the qualification of chapter 6 of the Constitution on leadership and integrity (honest, committed, ready to be held responsible for his acts, not corrupt, disciplined, among others);
- Have a degree from a recognized university;

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- Have knowledge and experience of not less than fifteen years in forestry and management.

This position should be advertised by the Public Service Commission in at least two daily newspapers, interviews done and 3 people shortlisted and the names forwarded to the Cabinet Secretary who does the appointment.

This strict process of appointing the CEO ensures that it is done in a transparent manner and only a qualified person is appointed.

3.3.1.2 Payment of board members

In the Act, it is the Minister who determines what salary and allowances board members should get. In the Bill the decision will be made by the Salaries and Remuneration Commission (a commission that sets the salaries and allowances for all public servants).

3.3.1.3. Director General of the KFS

The Act refers to the head of the KFS as the Director. His/her qualifications under the Act are that he/she should hold a degree from a recognized university in the field of forestry and should have at least fifteen years' experience in the relevant field.

In the Bill however, the head of KFS is referred to as the Director General and his/her qualifications are:-

- Be a citizen of Kenya;
- Hold a post graduate degree;
- Have 10 years' experience at a management level; and
- Have experience in forestry or natural resource management.

3.4 Officers of the Service

Under the Act, all Officers of the Service are appointed by the Board and report to the Director of the Service.

Under the Bill they shall also be appointed by and report to the Director of the Service except the uniformed and disciplined officers. The uniformed officers are under the command of the Inspector-General of the National Police Service but are supervised by the Director-General.

The office of the honorary forester has been removed in the Bill.

3.5 Forest Conservation Committees

Under the Act, Forest Conservancy Committees are located in each region e.g. Meru and Tharaka Nithi counties are in Eastern Forest Conservancy Committee to advise the Board on all matters relating to the conservation and utilization of forests within that region.

Under the Bill, the committees have been renamed to County Forest Conservation Committees and they will be based in each County. Their work is to advise the County Executive Committee

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on the management, conservation and utilization of all forests and forest resources within the County. Members of this Committee under the Bill will include:-

- a) A chairperson who is not a civil servant appointed by the Governor;
- b) One officer from the county responsible for the environment;
- c) One officer from the county responsible for water;
- d) One officer from the county responsible for agriculture;
- e) Five other persons with at least one nominated by each of the following organisations:
 - The Forestry Society of Kenya,
 - The National Association of Community Forestry,
 - The Kenya Private Sector Alliance,
 - The NGO Council (someone from a conservation NGO);
- f) County government Forest Manager.

The Committee shall meet once in 3 months.

The CFAs have representation in this committee since the National Association of Community Forestry (the overall body of all CFAs) will select one of the committee members. This means that CFAs will be heard in the County Executive Committee on matters of management, utilization and conservation of forest resources.

3.6 County Government Forest Manager

This office has been introduced in the Bill. A county government forest manager shall be appointed by County governments and shall be responsible for the carrying out of the National policies in the County as well as the County government forest programmes.

4. CLASSIFICATION OF FORESTS

Under the Act, forests are classified into 4 namely:

- a) State forests – these are forests owned by the Government of Kenya;
- b) Private forests – forests owned by people;
- c) Local Authority forests – forests that are within the area of control of a local authority such as a town or municipal council;
- d) Provisional forests – can either be private or local authority forests declared as provisional by the Minister if the owner or the local authority is not able to take care of the forest.

In the Bill, forests are classified as:-

- a) Public forests – forest land occupied by a State organ e.g. KFS offices or forest land bought by the Government, forest land which is not owned by an individual, a forest reserve, or a protected area.
- b) Community forests – forests registered in the name of a group representative or legally transferred to a specific community or held by a specific community as forest area,

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grazing area or shrine; ancestral forest land occupied by hunter-gatherer communities, or held as trust land by the county government on behalf of a group of people.

- c) Private forests – forests land owned by a private person.

The local community can own a forest under the Bill as long as it falls under (b) above.

Private persons can also own forests by registering their lands with forests with County government and the KFS.

There are various benefits to community forests owners including:-

- a) Money from the sale of trees and other forest produce and environmental services e.g carbon trading shall belong to the community.
- b) The community can apply for financial and technical assistance from the:-
 - National Community Forest Program; and the
 - National Reforestation Program.

On the other hand, private forest owners can apply for financial and technical assistance from:-

- Forest Management and Conservation Fund;
- National Reforestation Program.

5. MANAGEMENT OF FORESTS

5.1 Ecosystem Management Plans

Ecosystem is the living and non-living things in an area interacting with each other. A forest ecosystem contains all the living and non-living things found in that forest e.g. trees, weeds, water, rocks, animals, and insects. Ecosystem management means that in a forest we cannot only take care of trees, but that we should also take care of the water, animals and other living and non-living things found there. The Bill requires forests to be managed according to a plan that will ensure everything in the forest is taken care of. This plan shall be prepared with the help of the concerned government departments and agencies such as the department in charge of forests, the department in charge of water, the department in charge of animals, KFS, county governments, non-governmental organisations and CFAs.

5.2 Forest Management Plans

The Act says that every State, local authority and provisional forest should be managed according to a management plan prepared by the KFS and the local authority respectively.

The Bill says that forests on public land and on community land where the community has received public funding for community forestry or reforestation shall be managed in accordance with management plans approved by the KFS.

5.3 Public Forests

In the Act, the work of preparing Forest Management Plans (FMPs) for management of public forests belongs to KFS with the help of the forest conservation committee and community forest

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associations.

In the Bill, KFS is responsible for management of all forests on public land according to a forest management plan prepared in consultation with various stakeholders who must give free, prior and informed consent before the FMPs are developed. These stakeholders include:-

- i. Relevant County governments and government agencies;
- ii. Users and organisations of users of the forest from the private sector;
- iii. The local communities who obtain benefits from the forest; and
- iv. Any other persons and organisations.

The Bill says that CFAs are stakeholders in Forest Management Plans and their free, earlier and informed consent is required in preparing FMPs. Once prepared, CFAs have the right to comment on the FMP and forward their comments to KFS. KFS should consider those comments before making the final document.

5.4 Constitution Forests

They have been introduced under the Bill. They are to be established by the county governments close to towns in cooperation with communities and the private sector to celebrate the coming of the Constitution, 2010.

5.5 Arboreta, Urban Parks and Amenity Parks

Every county is required to prepare and maintain parks in town, arboreta (small forests), and amenity belts (environmentally friendly recreation areas) on road reserves within its area for entertainment and prevention of pollution. KFS is required to provide technical assistance when asked to do so by the County Forest Manager.

Since the Bill requires the county government to come up with constitution forests, arboreta, urban and amenity parks, the local community should help the county government in identifying areas where they can be established and should work together and assist in establishing and maintaining them.

5.6 Residential and Commercial Estate Developers

The Act requires property developers to provide for 5% of their land for tree planting; while the Bill provides that they should plant trees to cover at least 10% of the land area.

6. LICENCES

The Act does not have provisions relating to licences. Instead, the Minister is given power to make The Forests (Participation in Sustainable Forest Management) Rules, 2009 which give guidelines on licences.

The Bill however has these provisions:-

- A person should get authority to use forests and forest resources on public or community

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forests for commercial reasons e.g. cutting trees for sale or burning charcoal for sale from KFS or the County Government respectively.

- The licence shall only be given if the use of forests and forest resources is according to an approved forest management plan.

6.1 Types of Licences

- a) Commercial use licences – concessions on public or community forests (a long term agreement issued by the Service for the management of a specified forest area), timber sales contracts, community use permits (grazing, firewood collection), special use permits (eco-tourism, entertainment activities, conservation-based activities and construction of means of transport and communication such as roads and communication satellite receivers).
- b) Non-consumption permits for purposes other than harvesting or utilization of forest products and resources.

7. TRADE IN FOREST PRODUCTS

The Bill has introduced a process through which KFS can prove the exact location where forest products from public land are coming from.

The County government shall introduce the process for forest products from community land.

This system will prevent illegal holding and selling of forest products since it will now be possible to establish the origin of the products. It will also ensure that licence holders obey the conditions set by the licence.

8. FOREST FEES

The Act does not contain this section. The Bill has stated the forest fees to be paid for use of forest products and services.

These fees shall be set by the Cabinet Secretary in consultation with the Cabinet Secretary for Finance and the KFS.

There shall be 3 classes of forest fees:-

- a) Stumpage fees – associated with the harvest of forest resources;
- b) Land rental fees – associated with the use of public forests;
- c) Forest products fees – associated with the production, processing, registration, transport, import and export of forest products.

8.1 Payment of Fees

Under the Bill, fees will be paid by depositing money in a specified bank account through bank transfers and other electronic means including mobile phones.

Payment of fees has been simplified for the community since they have an option of paying through mobile phones instead of going all the way to KFS offices. Secondly, corruption will be reduced since fees will only be deposited in a specified bank account.

9. BENEFIT SHARING

The Act does not provide for benefit sharing arrangements between KFS and CFAs.

Under the Bill, there will be sharing of benefits from forests between the Community Forest Associations, the KFS and the County Government.

Benefit sharing is important because it encourages communities to conserve and manage forest resources.

10. NATIONAL COMMUNITY FORESTRY SUPPORT PROGRAMME

This was introduced in the Bill by the Cabinet Secretary for giving money and technical assistance to support community forestry development. It includes:-

- A programme to provide money to CFAs to prepare Forest Management Plans for community forests; and
- Paying qualified people to provide technical support to CFAs.

11. NATIONAL REFORESTATION PROGRAMME

This programme will be established to provide money and technical assistance to:-

- CFAs for planting trees afresh and where they have been cut on community forests;
- Smallholder farmers for planting trees on private forests.

12. OTHER PROGRAMMES

To support micro-enterprises in the forest sector.

To support training in the forest sector.

All the above programs are opportunities for funding for CFAs. CFAs should apply for these funds and technical assistance to help them meet some of their objectives.

13. PERMANENT FOREST SINK INITIATIVE

This is provided for in the Bill. Under this initiative, CFAs and landowners are required to plant trees on their community and private lands respectively from which they can sell carbon credits. Carbon credits are payments made for planting trees in large numbers. The initiative shall provide grants and technical assistance to CFAs and private land-owners to participate.

14. NATIONAL FORESTRY AWARDS AND PRIZES

The Bill states that research awards and scholarships for further knowledge on forest resource management and conservation may be granted annually by the Cabinet Secretary. Individuals and organisations may be also be awarded prizes for praiseworthy achievements and services in the forest sector.

This is a challenge to CFAs to work hard and achieve praiseworthy results in conserving their forests in order to win these awards.

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15. OFFENCES

Prohibited activities on forests on public land and community land

Unless a person has a forest licence or permission from the community he/she shall not:-

Offence	The Forest Act, 2005		The Forest Bill, 2012	
	Fine (not exceeding)	Imprisonment (not exceeding)	Fine (not exceeding)	Imprisonment (not exceeding)
Cut, remove or burn any forest produce	Not exceeding Kshs.50,000	Not exceeding 6 months or both	Kshs.100,000	6 months or both
Clear or cultivate land for cultivation or any other purpose	“	“	“	“
Put up any building or livestock shed	“	“	“	“
Set fire or assist to set fire on any forest produce	“	“	“	“
Bring any chain saw or logging equipment in the forest	“	“	“	“
Damage, remove or shift any beacon or boundary mark	“	“	“	“
Enter or remain in the forest between 7pm and 6am unless using a road or doing cultural, scientific or recreational activities	Kshs.50,000	6 months	Kshs.50,000	3 months
Enter any part which is not allowed by notice	“	“	“	“
Smoke where smoking is prohibited	“	“	“	“
Grazing livestock	“	“	Kshs.50,000	6 months
Wilfully or maliciously setting fire in a forest	Not less than Kshs.200,000	Not less than 1 year or both	Kshs.500,000	12 months
Producing charcoal for sale	“	“	Kshs.500,000	12 months
Hunting and killing and having tools of capturing animals	Kshs.10,000	3 months or both	Kshs.300,000	12 months or both
Fixing, removing or	Kshs.500,000	5 years or both	Kshs.100,000	6 months or both

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altering official marks and stamps on trees or official documents				
Operating a wood processing plant or forest-based industries	Kshs.1,000,000	10 years or both	Kshs.1,000,000	2 years or both
Wearing uniform or part of it pretending to be an employee of the KFS or county government	Kshs.500,000	5 years or both	Kshs.500,000	3 years or both
Introducing any genetic or persistent plants in a forest	Kshs 5,000,000	10 years or both	Kshs.5,000,000	10 years or both
Dumping solid or liquid waste	“	“	“	“
Growing plants from which narcotic drugs are produced	“	“	“	“
Violate the provisions of the Forest Act	Kshs.100,000	1 year	Kshs.500,000	2 years
Failure to comply with conditions of a licence	“	“	“	“
Failure to obey orders/demands of a forest officer	“	“	“	“
Interfering with a person carrying out legal duties under the Forest Act	“	“	“	“

Penalties for offences under the Bill are severe than under the Act to prevent people from engaging in acts prohibited under the Bill.