

8th December 2017

The Clerk of the National Assembly
P.O. Box
NAIROBI

Attn: Mr Michael Sialai

**RE: SUBMISSION OF MEMORANDUM ON THE PROPOSED
AMENDMENTS TO THE ENVIRONMENT MANAGEMENT AND
COORDINATION ACT, 1999 (EMCA) THROUGH THE STATUTE LAW
(MISCELLANEOUS AMENDMENT) (NO. 3) BILL, 2017**

We refer to the above matter and the call for public participation recently placed on the Daily Nation Newspaper on 2nd and 4th December 2017.

Pursuant to Article 10(2) and Article 118 of the Constitution of Kenya 2010, we hereby tender our submission towards the above-mentioned Bill.

Sincerely

Natural Justice
Kenya Natural Resource Alliance
Save Lamu
Friends of Lake Turkana
350.org
Kenya Oil and Gas Working Group

For any queries please contact:



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**Memorandum on the proposed amendments to the Environment
Management and Coordination Act, 1999 (EMCA) through the Statute
Law (Miscellaneous Amendments) (No. 3), Bill 2017**

Introduction

This memorandum addresses the proposed amendments to EMCA, 1999, specifically in relation to Sections 125 and 129.

We have set out the relevant sections of EMCA, including the proposed amendments. We have identified the proposed deleted sections by using strikethrough and the new sections or clauses appear in bold text.

Our comments and suggestions to the esteemed members of the National Assembly are then presented in the commentary section.

We trust that our comments will provide valuable insights for members during deliberations on these important matters.

Whilst we appreciate the notices posted by the Clerk to the National Assembly in the Daily Nation on 2nd and 4th December 2017, we note with concern the period allocated for providing comments is only five days. Such a short time-frame does hinder the public's ability to provide comments on such important matters. Providing more time for comments and public discussion will ultimately benefit the legislative process and by extension the Republic of Kenya.

We hope that the public is provided with a further opportunity to discuss the suggested amendments covered in this Bill.

We make the following :

- i. We humbly submit that the Chairperson of the Environmental Tribunal should be appointed by the Judicial Service Commission and should have the requisite qualifications as those of a Judge of the Environment and Land Court. As expounded this will ensure that the NET is chaired by a qualified individual and will serve to benefit the NET and users of the NET. We propose that amendment to s125 (1) (a) and s125 (5) be disallowed.*

- ii. We submit that the National Assembly should disallow the proposed amendments to s129 of EMCA as this will result in irreversible environmental degradation thereby imposing a substantial financial burden on the national and county governments in the event of an environmental disaster.*

Section 125: Change from Appointment of Chairperson by the Judicial Service Commission to election by the members of the Tribunal

125. Establishment of the National Environment Tribunal

(1) There is established a Tribunal to be known as the National Environment Tribunal which shall consist of the following members—

- a) a ~~Chairperson~~ **person** nominated by the Judicial Service Commission, who shall be a person qualified for appointment as a judge of the Environment and Land Court of Kenya;*
- b) an advocate of the ~~Environment and Land~~ **High** Court of Kenya nominated by the Law Society of Kenya;*
- c) a lawyer with professional qualifications in environmental law appointed by the Cabinet Secretary; and*

*(5) The members of the Tribunal shall, in their first meeting, elect from amongst themselves the ~~Vice-Chairperson~~ **a Chairperson to the Tribunal from amongst the persons appointed under paragraphs (a), (b) and (c) of subsection (1) and a Vice Chairperson from to the Tribunal amongst all members to the Tribunal.***

Commentary

The proposed amendment seeks to have the Chairperson of the Tribunal elected by members of the Tribunal, as opposed to appointment by the Judicial Service Commission. Whilst, prima facie, an innocuous amendment, we respectfully submit that this risk serious ramifications to the functioning of the National Environmental Tribunal.

When considering the merit of such an amendment it's important to recall the function of the Judicial Services Commission (JSC). The Judicial Service Act provides for the establishment of the JSC and its Secretariat. The JSC is an independent and appropriately qualified body, formed to appoint Judges of the High Court. The JSC is guided by a specific process of appointment designed to ensure that only appropriate candidates, with relevant experience and competencies, are awarded the position.¹

This is a sensible process when one considers the seriousness of the cases that a High Court must decide upon. Further, it was also the desire of the people of Kenya, as evidenced by their support for the new Constitution.

Similarly, the **current** Section 125 affords the same rigour to the appointment of the Tribunal Chairperson. There are cogent reasons for this given that the National Environmental Tribunal is also tasked with complex and sensitive matters of national importance.

¹ Judicial Service Act, 2011, Part V, paragraph 13

The NET is often called upon, through appeals and requests for directions, to balance the right to a clean and healthy environment with the importance of sustainable development.² Such a role, demands that the Chairperson have the requisite skills, experience and knowledge to guide the Tribunal. These are, in fact, the same competencies that the nation also demands of its High Court Judges.

A competent Chairperson, and properly constituted Tribunal would enable, not hinder, the people of Kenya to develop and sustainably achieve their aspirations, as set out in many policies and programs.

Independence, experience, qualifications, competencies and attributes of the NET Chairperson:

We refer to the Constitution of Kenya, specifically Article 166 (5), which provides guidance on the experience and qualifications required for a High Court Judge:

- a) *at least ten years' experience as a superior court judge or professionally qualified magistrate; or*
- b) *at least ten years' experience as a distinguished academic or legal practitioner or such experience in other relevant legal field; or*
- c) *held the qualifications specified in paragraphs (a) and (b) for a period amounting, in the aggregate, to ten years.*

Further, the JSC is to select an individual based on the following competencies and attributes³:

- i. Professional competence: *Includes but is not limited to substantive and procedural knowledge of the law, organisational and administrative skills and the ability to work well with a variety of people.*
- ii. Written and Oral Communication Skills
- iii. Integrity: Which includes history of honesty and high moral character in professional and personal life.
- iv. Fairness,
- v. A demonstrable ability to be impartial and commitment to equal justice under the law; and
- vi. Open-Mindedness and capacity to decide issues according to the law, even when the law conflicts with personal views;
- vii. Good Judgment, including common sense, the elements of which shall include a sound balance between abstract knowledge and practical reality and in particular, demonstrable ability to make prompt decisions

² Environment Management and Coordination Act, 1999
Section 129 (1): Appeals to the Tribunal
Section 139: Power to seek the directions of the Tribunal in complex matters, etc.

³ Part V, First Schedule to the Judicial Service Act

- that resolve difficult problems in a way that makes practical sense within the constraints of any applicable rules or governing principles;
- viii. Legal and life experience elements
 - ix. Amount and breadth of legal experience and the suitability of that experience for the position, including trial and other courtroom experience and administrative skills; and
 - x. Broader qualities reflected in life experiences,
 - xi. Demonstrable commitment to public and community service.

Such robust criteria are justified considering the functions that the Chairperson must discharge.

The Chairperson has more responsibilities when compared to other members. This includes having a casting vote in decisions where an even number of Tribunal members have heard the case. We also note that the Chairperson is the only full-time paid Tribunal member.

The independence of the Chairperson

It follows that independence of the Chair must be guaranteed and thus appointment by an independent commission, specifically set up for this role, is a vital and necessary element.

Should Tribunal members select a Chairperson, it also holds that they may pass a vote of no confidence against the Chairperson.

This raises the risk that the Chairperson may be placed under duress to make decisions, especially when considering the Chairpersons financial security is dependent on the position.

Any key national institution, assigned to adjudicate cases related to environmental decisions, should be respected and strengthened. The Chairperson sits at the forefront of this Institution and thus should be experienced, have sufficient competencies and afforded all opportunities to make independent decisions in service of national interests.

We therefore humbly submit that the Chairperson of the Environmental Tribunal should be appointed by the Judicial Service Commission and should have the requisite qualifications as those of a Judge of the Environment and Land Court.

We respectfully submit that amendment to s125 (1) (a) and s125 (5) be rejected.

Clarification on Granting of a Stay Order once an Appeal is lodged

Section 129

129. Appeals to the Tribunal

1. Any person who is aggrieved by—

- a. *the grant of a licence or permit or a refusal to grant a licence or permit, or the transfer of a licence or permit, under this Act or ~~regulations made thereunder~~ **its regulations.***
- b. *the imposition of any condition, limitation or restriction on ~~his~~ **the persons** licence under this Act or ~~regulations made thereunder~~ **its regulations;***
- c. *the revocation, suspension or variation of ~~his~~ **the persons a** licence under this Act or ~~regulations made thereunder~~ **its regulations;***
- d. *the amount of money which he is required to ~~pay~~ **paid** as a fee under this Act or ~~regulations made thereunder~~ **its regulations;***
- e. *the imposition against ~~him~~ **the person** of an environmental restoration order or environmental improvement order by the Authority under this Act or ~~regulations made thereunder~~ **its regulations;***

*may within sixty days after the occurrence of the event against which ~~he~~ **the person** is dissatisfied, appeal to the Tribunal in such manner as may be prescribed by the Tribunal.*

- 2. *Unless otherwise expressly provided in this Act, where this Act empowers the Director-General, the Authority or Committees of the Authority or its agents to make decisions, such decisions may be subject to an appeal to the Tribunal in accordance with such procedures as may be established by the Tribunal for that purpose.*
- 3. *Upon any appeal, the Tribunal may—*
 - a. *confirm, set aside or vary the order or decision in question;*
 - b. *exercise any of the powers which could have been exercised by the Authority in the proceedings in connection with which the appeal is brought; or*
 - c. *make such other order, including orders to enhance the principles of sustainable development and an order for costs, as it may deem just.*
 - d. ***if satisfied upon application by any party, issue orders maintaining the status quo of any matter or activity which is the subject of the appeal until the appeal is determined;***
 - e. ***if satisfied upon application by any party, review any order made under paragraph (a)***
- 4. ***Any status quo automatically maintained by virtue of the filing of any appeal prior to the commencement of subsection (3) shall lapse upon commencement of this section unless the Tribunal, upon application by a party to the appeal, issues fresh orders maintaining the status quo in accordance with subsection (3)(a).***

~~4. Upon any appeal to the Tribunal under this section, the status quo of any matter or activity, which is the subject of the appeal, shall be maintained until the appeal is determined.~~

Commentary on Section 129 (4)

Rationale for the existing Section 129 (4)

A stay order, as set out in Section 129(4) of the Environmental Management and Coordination Act, is a temporary remedy granted on the filing of an appeal to the Tribunal.

Such an order presumes that environmental harm is inherently irreparable⁴ and cannot be compensated by damages.⁵ It accepts that the environment is of significant value to the people of Kenya and is required for their health, livelihood and well-being. c

There is no need to repeat the vital role that the environment, which includes land and natural resources, play for the people of Kenya. Millions of people remain dependent on natural resources for their livelihoods, and it is the most reliable service provider for them. A healthy environment is also required for the future generations of Kenya.

Article 42 of the Constitution of Kenya provides that *“every person has the right to a clean and healthy environment, which includes the right (a) To have the environment protected for the benefit of the present and future generations **through legislative and other measures**, particularly those contemplated in Article 69...”*

At the heart of this right, are the principles of sustainable development and the inter and intergenerational principles. It grants the right to a clean and healthy environment to the people and places a duty to achieve this right on the state.

The stay order under s129 (4) EMCA is itself a legislative measure that seeks to preserve the status quo of the environment and acts as a preventive measure by avoiding any environmental harm. By its nature, it is a precautionary measure to prevent environmental degradation before it occurs, thus contributing to the best practice on sustainable development.⁶

⁴ Section 2, Environmental Management and Coordination Act 18 of 1999. Also, see Principle 15 *Rio Declaration on Environment and Development* (1992) which states that: where there are threats of damage to the environment, whether serious or reversible, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

⁵ Irreparable harm to the environment has been found on the basis of possible contamination of water, deterioration of air quality, impact on soil structure, loss of vegetation that takes a long time to re-establish to its present state, risk of harm to a unique geophysical formation, and risk of harm from introduction of foreign invasive species see 11.

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There is a growing consensus to place precaution at the forefront of environmental policy. This is to enable those responsible for protecting public health and environment to be proactive rather than reactive.

To its credit, Kenyan environmental regulations do recognize this approach by invoking the precautionary principle, which is defined in EMCA as:

"Is the principle that where there are threats of damage to the environment, whether serious or reversible, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."⁷

The point of this principle is to anticipate and avoid environmental damage before it occurs. Section 129(4) takes this approach, which ultimately serves to lower mitigation costs, which are often the result of impactful activities.

Effect of the proposed amendment to section 129 (4)

The proposed amendment requires the appellant to file a separate and additional application for a stay order after filing an appeal. The effect of this amendment could result in the following:

1. Environmental Injury

Environmental injury, by its nature, can seldom be adequately remedied by monetary compensation and is often of permanent or at least of long duration. Therefore, the time lapse between NEMA's decision to grant an environmental license, to file an appeal to the NET and for a stay order application to be heard can be substantial. Within that time, the environmental features that the applicants seek to protect can be irreparably harmed.

2. Time-Lapse

The time taken to hear and determine an application is dependent on a number of factors beyond the applicant's control. It is not uncommon for Tribunal hearings to be delayed due to the Tribunals busy schedule or availability. Further, stay applications may require significant periods of time to be heard.

3. Retrospective Effect

The proposed clause has a retrospective effect that potentially alters the rights and obligations of the appellant. Further, this amendment fails to consider wider environmental consequence or harm that will be occasioned to the public interest.

4. Unfair Financial Burden on Appellants:

Appellants are often not equipped with the resources that project proponents, either government or business, have. Any resources that they do have are

⁷ Section 2, Environmental Management and Coordination Act 18 of 1999. Also, see Principle 15 *Rio Declaration on Environment and Development* (1992)

utilised for the appeal itself, which often is an incredibly costly exercise. Placing an additional burden upon citizens, who are seeking to protect a public good, would be prohibitive and in contravention of the national principles of participation. This may result in a miscarriage of justice against the appellants but also against the greater Kenyan populace.

5. Test for Interlocutory Injunctions:

Unlike judicial processes in Kenya where the test for an interlocutory injunction has already been established and summarized in three principles⁸: the prima facie case with a high probability of success, a balance of convenience, and irreparable injury that cannot be compensated with damages, the proposed sub-clause is silent on the standards that need to be proved to obtain the order and safeguard the status quo.

6. Irreparable Harm and Monetary Value:

The proposed sub-clause presumes that irreparable harm is not imminent. This shifts a heavy burden of proof to the appellant to demonstrate that irreparable harm will exist that cannot be adequately compensated by a monetary award or other forms of recovery available at law. Environmental harms, as compared to economic harms, are irreparable. It is extremely difficult to value ecosystem services. In the cases they have been estimated, the value is very high⁹. Further, when an ecosystem is degraded it is almost impossible to restore it as is the case with Climate Change, and the impacts of these spread across multiple generations causing great human suffering. This argument was further reiterated by the Kenyan High Court in 2013 when it contemplated the value of trees cut in a forest that did not have a management plan, the High Court held that in such an instance it was impossible to put a price to the destruction of the forest given that there was no plan of planting the same type of trees that were harvested¹⁰.

We thus contend that automatic stay orders will benefit the environment- by extension the people of Kenya and serve to safeguard their economic and social rights envisioned in Article 43 of the Constitution.

7. The validity of Tribunal Orders:

Lack of an automatic stay order runs the risk of invalidating Tribunal orders and rulings. This can be attributed to the lapse of time between filing and determination of an appeal. During this period the activity that is being litigated upon may have commenced or reached a crucial stage possibly causing environmental harm. Thus the tribunal's preliminary decision to grant a

⁸ Also espoused in the case of *Giella vs Casemann Brown*.

⁹ In *Sampson vs Murray*, 415 U. S. 61 (1974) the court contemplated the impact of not issuing an injunction. It was noted that without an injunction of the developers of the Guana Cay which was in dispute would result in irreparable harm. Whereas the injunction would only harm the developer and government in terms of economic loss. Excerpts from the judgement: '*Unlike environmental harm, the financial loss is not considered irreparable. '.....' Injury to the natural resources at Guana Cay cannot be adequately remedied by money damages and will be irreparable. Because the injury is sufficiently likely, the balance of harms should favour issuance of an injunction to protect the environment.*'

¹⁰ *Joseph Leboo & 2 others v Director Kenya Forest Services & another* [2013] eKLR at paragraph 50

temporary injunction would be void and a waste of time and resources of the Tribunal and the parties before it.

This further has the impact of limiting the nature of orders the NET can make. Section 129 (3) of EMCA states the powers of the Tribunal. However, a lack of an automatic stay order will significantly curtail the powers of the NET, thus weakening its institution.

8. The principle of Sustainable Development:

The proposed amendment fails to provide the balance required for sustainable development. Though we agree there should be incentives for investment in Kenya, this should not be at the expense of the environments that many Kenyans are completely dependent on.

We, therefore, submit that the National Assembly should disallow the proposed amendments to s129 of EMCA as this will result in irreversible environmental degradation thereby imposing a huge financial and social burden on the national and county governments in the event of an environmental disaster. Further, this will undermine the right to a healthy environment, the right to public participation in environmental decision-making and the entire nature and purpose appeal process.