

OUR REF: NJ/Forest Community Participation Rules 2009/20/1
YOUR REF: TBA

Chief Conservator of Forests,
Kenya Forest Services
P.O. Box 30513 - 00100
Nairobi, Kenya

Copy advanced by email to director@kenyaforestservice.org

Dear Sir/Madam,

RE: COMMENTS ON THE FORESTS (COMMUNITY PARTICIPATION IN
SUSTAINABLE FOREST MANAGEMENT) RULES, 2009

We write pursuant to the Daily Nation advertisement dated **11.03.2020** inviting the public to submit written comments on the Forests (Community Participation in Sustainable Forest Management) Rules, 2009.

Below are our detailed views on the rules which we hope will provide valuable insights during the deliberation process.

Yours Sincerely,

Cc. Director Kenya Forest Research Institute
Kenya Forest Research Institute
P.O. Box 20412-0200
Nairobi, Kenya
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COMMENTS OF THE FORESTS (COMMUNITY PARTICIPATION IN SUSTAINABLE FOREST MANAGEMENT) RULES, 2009

No	Rule / Part	Sub-heading of the Rule	Proposed Changes	Rationale for Proposed Changes
1.	1	Citation	There should be more clarity as to whether these Rules should be cited as the ' <i>Forests (Participation in Sustainable Forest Management) Rules, 2009</i> ' or the ' <i>Forest (Community Participation in Sustainable Forest Management) Rules, 2009</i> '.	<p>According to the invitation of public views as per the Daily Nation advertisement dated 11.03.2020, the rules in question are referred to as the '<i>Forest (Community Participation in Sustainable Forest Management) Rules, 2009</i>'. On the contrary, the rules which have been in existence since 2009 are cited as the '<i>Forests (Participation in Sustainable Forest Management) Rules, 2009</i>'.</p> <p>This inconsistency is likely to cause confusion among members of the public who wish to participate in this review thus rendering the public consultation process ineffective. It is not clear, from the advertisement, whether changing the name of the rules is also part of the proposed changes or whether this was just an oversight on the part of the Ministry of Environment and Forestry (hereinafter referred to as "<i>the ministry</i>").</p>
2.	3	Interpretation	We propose the inclusion of a definition of the term ' <i>private sector</i> ' in the context of these rules.	The Rules are not clear regarding which entities fall within the category of private sector actors.
3.	6	Service to invite	The wording of this rule	One of the challenges of forest

		<p>private sector</p>	<p>should be amended to also allow private sector actors who are interested in contributing towards forest conservation and management to approach the Service.</p> <p>The rule can be amended as follows:-</p> <p><i>“The Service may, whenever circumstances make it necessary or appropriate to do so, <u>on its own motion or upon application by a private actor</u>, invite the private sector to participate in the sustainable management of state forests.”</i></p>	<p>conservation and management in Kenya is lack of adequate financial and human resources. The absence of specialised and technical skills in certain respects is also a great obstacle towards achieving sustainable forest management goals.</p> <p>To overcome these obstacles, the Ministry and other relevant administrative bodies should leverage on forming partnerships with private sector actors such as Civil Society Organizations who are willing to offer voluntary support to bridge these gaps. This can be achieved by allowing interested private sector actors to approach the Service specifically with the aim of forming Joint Management Agreements.</p> <p>However, the wording of this rule can be construed to mean that the Service is the only body with powers to invite the private sector’s participation in forest management and not vice-versa. It is a top-down approach to governance which may not benefit the larger population.</p>
4.	21 (2)	Special-Use Licence	<p>For the avoidance of doubt and in the interest of consistency with other legal frameworks, we recommend the re-wording of this rule to expressly require an applicant to obtain an Environmental Impact</p>	<p>This rule provides that the Service shall evaluate an application received and may issue a special-use licence “after the completion of any environmental impacts required under law”.</p> <p>It is possible to misconstrued this</p>

			<p>Assessment (EIA) licence and comply with land acquisition procedures where applicable before applying for and being issued with a special-use licence.</p> <p>This rule can be amended as follows:-</p> <p><i>“21 (2) The Service shall evaluate an application received under paragraph (1) and may, <u>after issuance of an environmental impact assessment licence required under EMCA and compliance with land acquisition procedures where necessary</u>, issue a special-use licence if satisfied that the proposed activity is in the public interest.”</i></p>	<p>provision to mean that the only precondition for the issuance of a special-use licence is the completion of an environmental impact assessment study. Whereas conducting an environmental impact assessment study is mandatory, the Service should not consider an application until the applicant proves that they have also obtained an EIA licence.</p> <p>Our second concern is that the rule fails to take into account instances where activities undertaken pursuant to a special-use licence may require the acquisition of land belonging to forest communities. Where land acquisition is necessary in the interest of the public the law dictates that the acquisition process must be conducted within the confines of the Constitution and adequate compensation must be provided. As such, this should also be a precondition for the issuance of a special-use licence.</p>
5.	41	Service to invite community participation	<p>Rather than give the Service discretionary powers to invite forest associations to participate in the management of forests, this rule should make it mandatory for the authority to ensure the participation of forest associations.</p> <p>This rule could be re-drafted as follows:-</p>	<p>One of the guiding principles of environmental management under Article 69 of the Constitution and Section 4 of the Forest Conservation and Management Act is the participation of the public and communities. It is a mandatory requirement and not an option. Therefore, Rule 41 should be amended to conform with the Constitution and the Forest Conservation and Management</p>

			<p><i>“41. The Service shall ensure the participation of forest associations in the management of state forests.”</i></p>	<p>Act which is the primary legislation pursuant to which these rules are developed.</p>
6.	65.	Register	<p>The Service should consider including an additional requirement in this rule to provide for the gazettelement of any authorisations issued to private actors pursuant to the provisions of these Rules. An online register of all authorizations granted should also be published on a website and constantly updated.</p>	<p>Our proposal is based on the need to keep the public informed about all decisions made by the Service as stipulated under the Constitution and Access to Information Act.</p>
7.	Form 5	Clause 14 of the Community Management Agreement on Dispute Resolution	<p>Before using other dispute settlement methods, the community management agreement should allow parties to use traditional dispute resolution methods.</p> <p>Where this fails, parties should be free to refer their dispute to other Alternative Dispute Settlement methods of their choice.</p>	<p>Form 5 which provides a template from Community Management Agreements makes a mandatory requirement for parties to refer their disputes to arbitration.</p> <p>We are of the view that since arbitration has its own advantages and disadvantages, parties should be allowed to select an Alternative Dispute Resolution mechanism of their choice depending on their needs. But most importantly, the use of Traditional Dispute Settlement approaches must be given priority in such circumstances.</p>