

THE PROPOSED REPEALING OF SECTION 34(2A) OF THE FOREST CONSERVATION AND MANAGEMENT ACT 2016 FACTSHEET

BRIEF BACKGROUND

- The Forest Conservation and Management (FCM) Act was passed in 2016 and subsequently Amended in 2018 through the Statute Law (Miscellaneous Amendment) Bill 2018.
- In 2018, the Statute Law (Miscellaneous Amendment) Act introduced section 34(2A) to the Act, which stipulates that: A petition under subsection (1) shall only be forwarded to the National Assembly on the recommendation of the [Kenya Forest Service] Service.

THE CURRENT LEGAL PROVISION (SECTION 34 (1), (2) AND (2A))

FCM Act allows for variation of forest boundaries so long as this does not: -

1. endanger any rare, threatened, or endangered species; or
2. adversely affect its value as a water catchment area, and prejudice biodiversity conservation, cultural site protection of the forest or its use for educational, recreational, health or research purposes.

This can be done by petitioning the National Assembly for the variation of boundaries and such petition can only be forwarded to the National Assembly upon the recommendation of KFS. (Section 34(2) read together with (2A))

BEFORE THE 2018 AMENDMENT

Before introducing sub-section 2A; section 34 provided that anyone could petition parliament for the variation of boundaries of a public forest or the revocation of the registration of a public forest or a portion of a public forest.

AFTER THE 2018 AMENDMENT

The 2018 amendment sought to incorporate KFS in the process by requiring them to scrutinise petitions before recommending them to the National Assembly.

PROPOSED AMENDMENT

The Forest Conservation and Management (Amendment) Bill, 2021 seeks to:

- a. Do away with the requirement to seek the approval of KFS; and
- b. Insert a provision that places an obligation on either the Clerk of the National Assembly or a Committee of the House to review the petition and ascertain whether it meets the requirements of the Act, the Petition to Parliament (Procedure) Act 2021 and the Standing Orders of the National Assembly.

Following this review, they may either : -

- Request for relevant information from the petitioner; or
- Issue directions for the amendment of the petition

A petition may only be rejected where a petitioner fails to comply with either of the directions given.

JUSTIFICATION OF THE AMENDMENT BY PARLIAMENT

- The proposers of the Amendment Bill state that the Constitution does not provide recommendations by the KFS as a pre-requisite to petition Parliament. In the Hansard Report of 28th April 2021, Ndaragwa MP gives the rationale when introducing the amendment as follows:

“I filed a petition on behalf of the people of Ndaragwa, who desired a variation of a boundary, so that we can create a headquarter, an area that we have occupied since 1946. The direction that I was given is that I needed to go through the due procedure so that the Kenya Forest Service eventually recommends the petition to the House. I have done all that. We have spent a lot of money to get the documents done and they are now stuck with KFS. They would never recommend anything to this House. As you look at other provisions of law, it is important to know that which is provided for, that KFS must okay these petitions or requests for petitions. They are using that petition to deny us an opportunity to change the boundaries. It is not to change the boundary so that you allocate yourself land, but to change the boundaries so that we can accommodate headquarters, public facilities that Kenyans themselves have allowed.” (Retrieved from the National Assembly Hansard)

- KFS failure to recommend Petitions that have directly affected some parliamentarians, and KFS delay in considering petitions forwarded to them, seem to be the primary justifications for the proposed amendment.

POTENTIAL LEGAL IMPLICATIONS OF THE AMENDMENT

- According to KFS, the Local Forest Conservation Committees approve any proposed variation of forest boundary, that has undergone Independent Environmental Impact Assessment and full public participation.
- In the absence of KFS, these safeguards would only be undertaken on the discretionary recommendation of the Cabinet Secretary under Section 34(4) of the Act, which provides that: The Cabinet Secretary shall, within thirty days of the petition being committed to the relevant Committee, submit a recommendation on whether the petition should be approved subject to-
 - (a) the Petition being subjected to an Independent Environmental Impact Assessment; and
 - (b) Public consultation being undertaken in accordance with the Second Schedule.
- While the KFS various processes may cause a delay, the procedures are essential and speak to the values and principles of the Constitution.
- If the amendment is allowed, there is no guarantee that the process of varying boundaries will be subjected to Independent Environmental Impact Assessment and there will be no public consultation.

ARGUMENTS FOR OPPOSITION

This amendment would result in the politicization of the process hence sidelining the key prior environmental safeguards and human rights considerations put in place by the law to ensure that the integrity of our forests and biodiversity are respected.

ARGUMENTS FOR SUPPORT

Getting KFS out of the picture will be a solution to the past failure of KFS to recommend Petitions that directly affect the petitioners which has necessitated the amendment.

NATURAL JUSTICE CONCERNS

- The Amendment will remove key prior environmental, climate issues and human rights considerations as an integral part of the petition process.
- The Amendment does not encourage much-needed collaboration of other relevant administrative institutions which are equally important when considering petitions. These include the National Land Commission (NLC) – on issues of land; National Environment Management Authority (NEMA) – on issues of environmental impacts. Etc
- The Amendment does not resolve the administrative failures of KFS which might better be resolved by introducing regulations or guidelines on how KFS executes its mandate and how its decisions may be challenged.

WHY SHOULD THE PUBLIC CARE?

- Matters of forest conservation and management affect our day-to-day lives when we look at the context of the current planetary crisis of biodiversity loss and climate change. Therefore, the stakes are high for us as country and the world at large and future generations.
- If there isn't good and proper oversight of these variation processes we are bound to face severe climate challenges and impacts which we are already witnessing in the form of prolonged droughts, extreme heat events and increased cost of food production. Now more than ever, we must recognize the important role that plays in climate mitigation and adaptation.

NEXT STEPS

- There are opportunities for citizens to engage in the process of developing this legislation. The Bill will be read in parliament for the first time on Tuesday 25th January after which it is sent to the relevant Committee. Look out for invitations of notices to submit comments or participate in public hearings/meetings with the relevant parliamentary Committees.
- There are existing online petitions on different websites which people can consider further and propose recommendations: on Avaaz, [change.org](https://www.change.org).

Natural Justice recommends that whichever body is bestowed with this power, provisions must be made to guarantee the inclusion of relevant stakeholders in the petition process, the mandatory requirement to conduct independent environmental assessment and that proper oversight of the responsible institution is guaranteed.