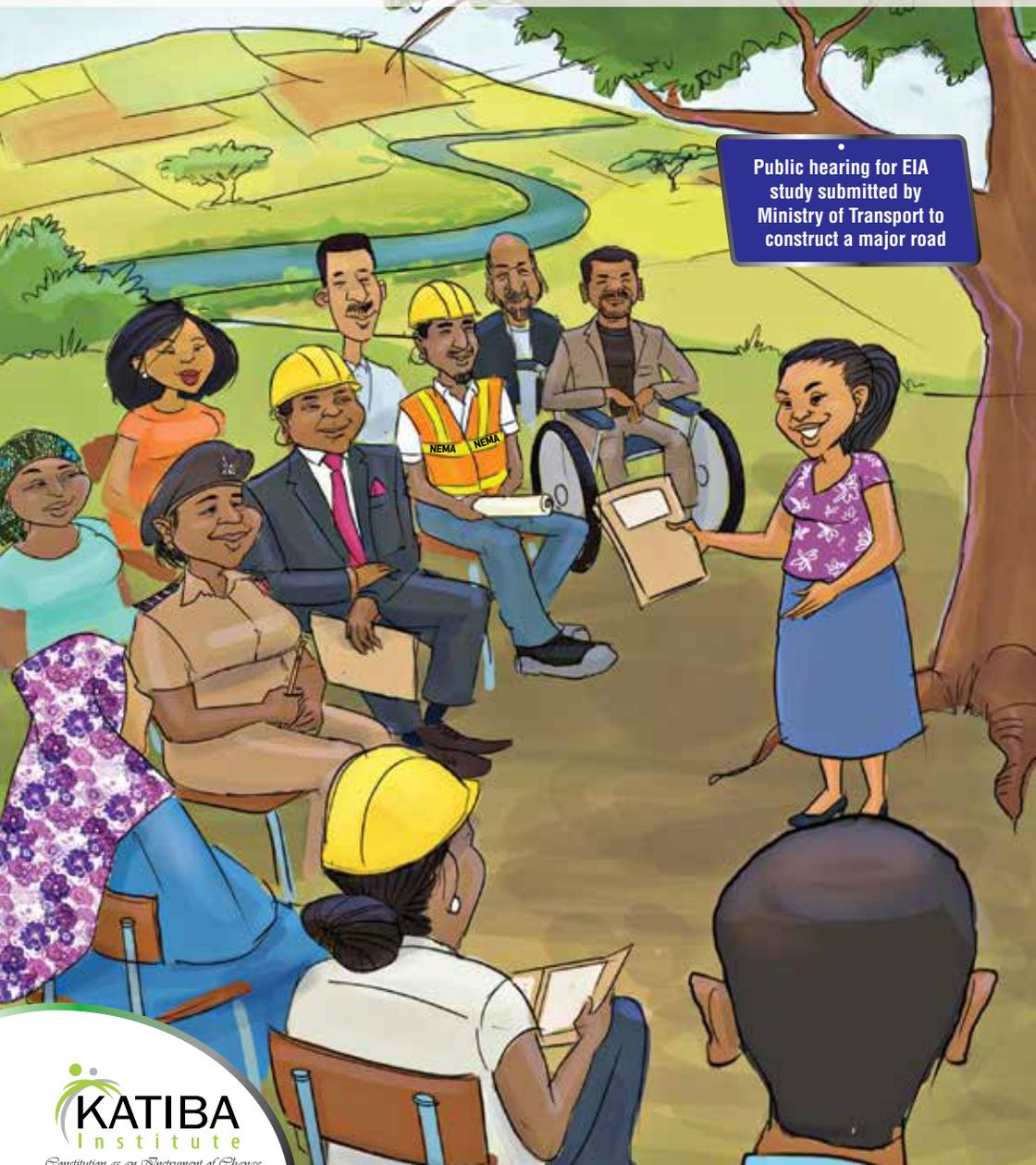


A Guide on the Basics of Environmental Impact Assessments in Kenya

Public hearing for EIA study submitted by Ministry of Transport to construct a major road



Designed & printed by Chrome Partners Limited

P. O. Box 14159 - 00100, Nairobi, Kenya

Tel: +254 700 247 365

Email: info@chromepartners.co.ke

Website: www.chromepartners.co.ke

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For copies and permission contact Katiba Institute

Cell: +254 704 594962

Email: info@katibainstitute.org

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Introduction

Human beings exist within physical structures, natural and artificial, that together create their environment; these include land, water, atmosphere, climate, sound, odour, taste, animals and plants¹. The conservation and protection of all these factors are necessary to guarantee not only a good quality of life for human beings, but also to support economic, social and cultural activities, such as access to safe and clean drinking water, food of high quality, good health, housing in a clean environment, the right to livelihood (fishermen, farmers, tourism), sporting and other social events, religious and cultural rites, habitat for plants and wildlife, and provides individual and communal identity etc. In other words, the environment is the natural resource from which human beings derive their social, cultural and economic development.

The Constitution of Kenya provides the right to a clean and healthy environment (Article 42)², and the right “to have the environment protected for the benefit of present and future generations through legislative and other measures ...).” In that regard Article 69 creates an obligation on the state (national and county governments) to respect the environment. The national and county governments are required to³:

“ensure sustainable exploitation, utilization, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits ...; encourage public participation in the management, protection and conservation of the environment ...; establish systems of environmental impact assessment, environmental audit and monitoring of the environment; eliminate processes and activities that are likely to endanger the environment; and utilize the environment and natural resources for the benefit of the people of Kenya”.

(The Constitution has been criticised for stopping at a requirement to encourage participation rather than requiring it.⁴)

The Constitution creates a framework in which a reasonable balance can be made between economic development and environmental protection; with the second not being sacrificed for the first.

“To an extent, there is a right to development. However, even this right is not free of limitations and regulations. It is not an unfettered right so as to completely give a go-by to the issues of environment. Development may be carried out to satisfy the need of a developing society but it has to be regulated so as to satisfy the requirement of preservation and nurturing of the natural resources, which are the real assets of the society” (*M.P. Patil vs. Union of India*, National Green Tribunal of India, 2014).⁵

In this guide we shall focus on environmental impact assessments processes, which are aimed at ensuring the dual goals of sustainable exploitation of natural

resources and conserving a clean and healthy environment, when major projects are carried out.

The Constitution of Kenya does describe natural resources⁶ but we shall refer to a simpler description of natural resources as including “air, land, water, animals and plants, including their aesthetic (visual) qualities”⁷. The majority of infrastructural developments and commercial enterprises we encounter on a day to day basis are built on land, be they roads, schools, hospitals, offices, houses, markets, bus parks, etc⁸. Some of these social amenities are built on public land. However, other amenities, including large scale commercial enterprises may be built on private land, such as privately owned hospitals, schools and housing complexes, malls, large wheat, tea, coffee or flower farms, factories etc. There is another category of land in Kenya, community land; this category sometimes includes forests that are claimed by some communities as their ancestral land.⁹

Who is the Guide for?

Most developers will already be familiar with the idea of an Environmental Impact Assessment (EIA). The first time developer may find this Guide useful however. But once they realise that they must submit certain reports to the National Environment Management Authority (NEMA), they will have to use an expert registered with NEMA to prepare the report. However, it is always wise to have a good idea of what an expert is to do, in order to be able to check on whether that expert seems to be doing a good job. After all, if the EIA report is held to be inadequate, either by NEMA or a court, the burden of delay or even complete refusal of permission to proceed will fall on the developer.

But the main readership of this Guide is likely to be the members of the public, or Non-governmental Organisations (NGOs), who wish to be sufficiently knowledgeable to challenge an EIA report, or to participate in public meetings about the project.

The Law

EIAs are tools for environmental protection. As noted above, because Kenyans have the right to a clean and healthy environment, a legal and policy framework must be in place to protect and conserve the environment. The right also includes the obligation to have the environment protected for the benefit of present and future generations. This obligation relates to the concept of sustainable development. Sustainable development refers to “development that meets the needs of the present generation without compromising the ability of future generations to meet their needs by maintaining the carrying capacity of the supporting ecosystems”¹⁰. The same concept is reflected in the principles of public finance management, where Article 201(c) of the Constitution provides that “the burdens and benefits of the use of resources and public borrowing shall be shared equitably between present and future generations”. Again, these concepts refer to the balance that must be maintained between economic development and environmental protection. These and other concepts of environmental protection and management are provided for

in greater detail in the Environmental Management and Coordination Act (EMCA), No. 8 of 1999. The Act also adopts international best practice in environmental protection.

What is NEMA?

The National Environment Management Authority is a parastatal body, not part of a ministry. Its functions are to “to exercise general supervision and co-ordination over all matters relating to the environment and to be the principal instrument of Government in the implementation of all policies relating to the environment”.

It is not as independent as a Commission. The Chair is appointed by the President. Two Principal Secretaries are members, as is the Attorney General and six people who are not public officers but are appointed by the Cabinet Secretary.

The Act creates NEMA, and mandates it to implement government policies on the environment and have general supervision over all matters relating to the environment¹¹. NEMA’s responsibility is to integrate environmental considerations into development plans and projects. It is the role of policy makers to set out a broad economic vision, and the role of NEMA to ensure the public and decision makers have all of the information needed to evaluate the impact of proposed development projects on communities and the environment¹². One of NEMA’s core obligations is to “identify projects and programs or types of projects and programs, plans and policies for which environmental audit or environmental monitoring must be conducted ...”¹³

Environmental Impact Assessments

The Act defines EIAs as “a systematic examination conducted to determine whether or not a program, activity or project will have any adverse impacts on the environment”¹⁴. But this does not bring out another aspect: if there is likelihood of any adverse impact on the environment, then what steps will be taken to prevent or minimise those effects – called “mitigation”?

“The purpose of the assessment is to ensure that decision-makers consider the environmental impacts when deciding whether or not to proceed with a project. EIAs are unique in that they do not require adherence to a predetermined environmental outcome, but rather they require decision-makers to account for environmental values in their decisions, and to justify those decisions in light of detailed environmental studies and public comments on the potential environmental impacts. Hence, EIA is designed to ensure that planning decisions involving significant effects on the environment are taken by bodies with full information as to the relevant factors” *Mohamed Ali Baadi & others vs. Attorney General & 11 others* High Court (2018).¹⁵

An important element in the whole idea of EIAs is public involvement, rather than simply an expert evaluation by a government agency. This is particularly important when the project itself is a government project.

There are various laws that govern environmental management in Kenya¹⁶, but the law that provides when and how EIAs are to be carried out is EMCA.¹⁷ The legal framework for this whole process is found in Part 6 of EMCA and also the Environmental (Impact Assessment and Audit) Regulations, 2003 (EIA regulations) made by Minister (Cabinet Secretary) of the time, plus recent amendments to Schedule Two of the Act and the regulations.

For what projects does an EIA have to be done?

Any project that is likely to have a significant negative impact on the environment requires an EIA study. This applies to both government and private projects. But when is a project likely to have sufficiently serious impacts that it needs an EIA? If a person builds an additional room of their house, it will not have serious impacts (but they may need planning permission). But suppose they build a huge house? Or an estate of 100 houses? Or a block of flats?

A footpath in an urban area will not need an EIA, but when does a road become sufficiently large that it needs one; when it is a certain width, or length, or does it depend on where the road is?

The first place to go to see if a project needs a project report is the Second Schedule of EMCA amended in 2019 by a regulation. It divides projects, businesses, trade, enterprises, actions or activities into low, medium and high risk.

There seem to be no particular consequences to whether something is “low” as opposed to “medium” risk. The significant difference is whether a project is (i) not listed as presenting risks at all, (ii) is a low or medium risk project and (iii) is a high risk project.

Regulation 7(1) of the EIA regulations requires that for low and medium risk projects, “a summary project report of likely environmental effects of the project” be submitted to NEMA.

The following table gives a few examples of low, medium and high risk projects. A fuller list is at the end of this booklet (Annexes 1 and 2).

Low	Medium	High
Community water projects including boreholes, water pans, sand dams and sub-surface dams	Water resources and infrastructure, including - (a) Drilling for purposes of utilizing ground water resources and related infrastructure (b) Water abstraction works Water supply and distribution infrastructure	Major roads, including trunk roads
Local roads and facility access roads	Abattoirs and meat-processing plants;	Establishment or expansion of recreational areas in National Parks, National reserves, forests, nature reserves and any areas designated as environmentally sensitive
Schools and related infrastructure for learners not exceeding one hundred		Establishment of schools and other learning institutions exceeding one hundred learners
Artisanal mining		Mining of precious metals, coal, ores, sand, gravel, clay etc.
		Abattoirs handling more than one hundred animals per day and meat-processing plants;

From this you can see that size and location are the main factors influencing whether a project is listed as low, medium or high risk or not listed at all.

Low and medium risk projects: Project Report

If a project falls into the category of low or medium impact then the developer must prepare a “summary project report”.

When must this report be done?

EMCA provides that the report must be submitted “before any financing, commencing, proceeding with, carrying out, executing or conducting or causing to be financed, commenced, proceeded with, carried out, executed or conducted by another person any undertaking”¹⁸. The possibility of finance could be explored, but no binding commitment made. But obviously some plans must be made in order that the project report can contain the information required. Actual site preparation, construction etc. must not be begun before the necessary approval is received from NEMA.

Who must prepare this report?

The project “proponent” - that is the person proposing to carry out a project - must submit the project report, but it must be prepared by an expert registered under the regulations.¹⁹ (We call the proponent the “developer” in the rest of this booklet).

Registered EIA Experts

Project reports and full EIA studies must be prepared for developers by experts registered with NEMA. (The 2019 list of experts can be downloaded from http://www.nema.go.ke/index.php?option=com_content&view=article&id=18&Itemid=156).

NEMA sets out lists of qualifications for being registered (see http://www.nema.go.ke/index.php?option=com_content&view=article&id=20&Itemid=159, and the Fourth Schedule to the 2003 Regulations).

EIA experts are governed by a code of practice also issued by NEMA (see <http://www.nema.go.ke/images/Docs/CodeofpracticeandprofessionalEthics.pdf>).

What must be in the project report?

The regulations set out in detail what must be in a summary project report:²⁰

- (a) the nature of the project;
- (b) the location of the project including:
 - i. proof of land ownership, where applicable;
 - ii. any environmentally sensitive area to be affected;
 - iii. availability of supportive environmental management infrastructure; and
 - iv. conformity to land use plan or zonation plan;
- (c) potential environmental impacts of the project and the mitigation measures to be taken during and after implementation of the project.

The person preparing the report must ensure that they identify the possible environmental impacts. Guidance on this is in the Second Schedule of the Regulations: it lists many possible impacts of projects under headings:

- Ecological impacts - like biological diversity
- Social impacts - like effects on transport, healthy, culture
- Landscape - views
- Land uses
- Water - including quantity and quality

What are “mitigation measures”? This means the steps that the developer will take to prevent the environmental injury actually occurring, or at least minimising them.

Mitigation measures include engineering works, technological improvements, management and ways and means of minimizing negative aspects, which may include socio-economic and cultural losses suffered by communities and individuals, whilst enhancing positive aspects of the project - regulation 2 of EIA Regulations.

What happens next?

Upon receiving the summary project report NEMA must decide within five days whether or not the proposed project would have a significant and adverse impact on the environment. If it decides it will not, NEMA will approve the project²¹. If NEMA decides significant and adverse impacts are likely, it will require the developer to prepare and submit a comprehensive project report.

A comprehensive project report must specify²²:

- (a) the nature of the project;
- (b) the location of the project including:
 - i. proof of land ownership;
 - ii. the Global Positioning System coordinates; and
 - iii. the physical area that may be affected by the project's activities;
- (c) the activities that shall be undertaken during the project construction, operation and decommissioning phases;
- (d) description of the international, national and county environmental legislative and regulatory frameworks on the environment and socio-economic matters;
- (e) the preliminary design of the project;
- (f) the materials to be used, products and by-products, including waste to be generated by the project and the methods of their disposal;
- (g) the potential environmental impacts of the project and the mitigation measures to be taken during and after implementation of the project;
- (h) an analysis of available alternatives including an alternative:
 - i. project site;
 - ii. design; and
 - iii. technologies and processes, and the reasons for preferring the proposed site, design, technologies and processes;
- (i) an action plan for the prevention and management of possible accidents during the project cycle;
- (j) a plan to ensure the health and safety of the workers and neighbouring communities;
- (k) the economic and socio-cultural impacts to the local community and the nation in general;
- (l) a plan to ensure the relocation or resettlement of persons affected by the project;
- (m) a strategic communication plan to ensure inclusive participation during the study and provide a summary of issues discussed at the public participation forum;
- (n) an environmental management plan;
- (o) integration of climate change vulnerability assessment, relevant adaptation and mitigation actions;
- (p) the project costs;²³ and
- (q) any other information the Authority may require.

Within 7 days of receiving the comprehensive project report, NEMA forwards a copy of the Report to relevant "lead agencies" - meaning various government bodies with particular relevant responsibilities²⁴ - and the relevant County

Environment Committee. These bodies must make their written comments within 20 days. All in all, the law expects NEMA to make a decision on the project report and communicate the decision to the Developer within 45 days of NEMA receiving the project report²⁵.

After reviewing the comprehensive project report, NEMA determines whether it discloses sufficient mitigation measures, and if satisfied, NEMA may issue a licence²⁶.

High Risk projects: A full EIA Study

An EIA study is required for high risk projects. The Second Schedule to EMCA lists high risk projects– a few examples were given earlier and there is a full list in Annex 2.

Scoping

“Scoping” is the first stage in a full EIA process. Oddly, “scoping” is described neither in EMCA nor the current EIA regulations. However, the draft Environment Impact Assessment Guidelines and Administrative Procedures, dated November 2002 (accessible on NEMA’s website), provide a description of scoping (at p. 9 – see box):

A project that the Authority (NEMA) considers should be subjected to an EIA study must first undergo a scoping study. Scoping is a procedure used to determine the range of issues to be addressed in the EIA study; it also is the process of identifying the significant issues, which are related to the proposed project. Its main objective is to focus the EIA on the key issues, while ensuring that indirect and secondary effects are not overlooked and eliminating irrelevant impacts. Thus, scoping identifies the key concerns, evaluates them, organizes and presents them to aid decision-making. Like in screening, scoping hinges on the issue of significance. It is during scoping that the Terms of Reference (TOR) for an EIA Study are formulated.

An EIA study must be conducted according to terms of reference (TORs) developed during the scoping exercise by the developer and approved by NEMA.

Therefore, the full requirements for a particular EIA study depend on the law (EMCA and its various regulations) and the scoping exercise.²⁷

As with project reports, a full EIA study is carried out by a registered expert. When the TORs have been approved, the developer must submit to NEMA the names and qualifications of the experts appointed to carry out the EIA study.

An EIA study must consider social, cultural, economic and legal factors including the following:²⁸

- (a) identify the anticipated environmental impacts of the project and the scale of the impacts;
- (b) identify and analyze alternatives to the proposed project;

- (c) propose mitigation measures to be taken during and after the implementation of the project; and
- (d) develop an environmental management plan with mechanisms for monitoring and evaluating the compliance and environmental performance which shall include the cost of mitigation measures and the time frame of implementing the measures.

Additional guidelines are provided in the Second and Third Schedules of EIA regulations. The Second Schedule to the Act covers issues to be considered (see above and Annex 3 to this booklet). And the Third Schedule deals with general EIA guidelines (broad issues that must be included). These are:

- Sources of impact;
- Project inputs;
- Project activities;
- Areas of impact on the natural and human environments;
- Environmental guidelines and standards (National legislation, international guidelines, international conventions and treaties);
- Mitigation measures;
- Environmental management plan; and
- Environmental monitoring and auditing.



EIA study report to NEMA

After the EIA study is carried out, a report is prepared and submitted to NEMA. It must include the following²⁹:

- (a) the proposed location of the project;
- (b) a concise description of the national environmental legislative and regulatory framework, baseline information and any other relevant information related to the project;
- (c) the objectives of the project;
- (d) the technology, procedures and processes to be used, in the implementation of the project;
- (e) the materials to be used in the construction and implementation of the project;
- (f) the products, by-products and waste generated by the project;
- (g) a description of the potentially affected environment;
- (h) the environmental effects of the project including the social and cultural effects and the direct, indirect, cumulative, irreversible, short-term and long-term effects anticipated;
- (i) alternative technologies and processes available and reasons for preferring the chosen technology and processes;
- (j) analysis of alternatives including project site, design and technologies and reasons for preferring the proposed site, design and technologies;
- (k) an environmental management plan proposing the measures for eliminating, minimizing or mitigating adverse impacts on the environment; including the cost, time frame and responsibility to implement the measures;
- (l) provision of an action plan for the prevention and management of foreseeable accidents and hazardous activities in the cause of carrying out activities or major industrial and other development projects;
- (m) the measures to prevent health hazards and to ensure security in the working environment for the employees and for the management of emergencies;
- (n) an identification of gaps in knowledge and uncertainties which were encountered in compiling the information;
- (o) an economic and social analysis of the project;
- (p) an indication of whether the environment of any other state is likely to be affected and the available alternatives and mitigating measures; and
- (q) such other matters as the Authority may require.

What happens then?

After receiving the EIA study report, NEMA must within 14 days provide a copy to relevant lead (government) agencies for their comments. The lead agencies must assess the study report to ensure that it complies with the TORs and covers all the necessary issues and information. Those lead agencies are required to provide their feedback to NEMA within 30 days of receiving the study report³⁰.

Granting the licence

At this stage, NEMA must make a decision on whether to grant an EIA licence³¹. It may require additional information from the developer to ensure that the EIA study is accurate and as exhaustive as possible; this is because NEMA is not only

required to ensure that the content of the EIA is complete but also that where procedure is provided for, it is substantially complied with. In making that decision, the law requires NEMA to pay particular attention to:

- (a) the validity of the environmental impact assessment study report with emphasis on the economic, social and cultural impacts of the project;³⁴
- (b) the comments made by a lead agency and other interested parties;
- (c) the report of the presiding officer compiled after the public hearing; and
- (d) other factors which NEMA may consider crucial in the implementation of the project.

A decision on whether or not to grant an EIA licence must be made within 3 months of submission of an EIA study report to NEMA by the developer. The decision must be communicated to the developer in writing, and reasons for the decision must be given³⁵.

Finally, when NEMA approves an EIA study it will issue an EIA licence to the developer on terms and conditions it believes are necessary for the protection of the environment, to ensure sustainable development and sound environmental management³⁶.

A new EIA study report?

NEMA may require submission of a fresh EIA study report after the EIA licence is issued if³⁷:

- (a) there is a substantial change or modification in the project or in the manner in which the project is being operated;³⁸
- (b) the project poses environmental threats which could not be reasonably foreseen at the time of the study, evaluation or review; or
- (c) it is established that the information or data given by the [developer] in support of his application for an [EIA] licence ... was false, inaccurate or intended to mislead.

Any EIA licence that had been issued can be cancelled or suspended by NEMA. Once NEMA cancels or revokes an EIA license, including for contravening conditions of the license, the holder cannot proceed with the project until a new license is issued by NEMA³⁹.

Participation of Stakeholders and the Public

During the process of carrying out the EIA study, the developer, through the appointed EIA experts/firm must seek the views of persons who may be affected by the project.

Public participation during this phase should be carried out, at a minimum with the following activities⁴⁰:

- (a) publicize the project and its anticipated effects and benefits by -
 - i. posting posters in strategic public places in the vicinity of the site of the proposed project informing the affected parties and communities of the proposed project;

- ii. publishing a notice on the proposed project for two successive weeks in a newspaper that has a nationwide circulation; and
 - iii. making an announcement of the notice in both official and local languages in a radio with a nationwide coverage for at least once a week for two consecutive weeks;
- (b) hold at least three public meetings with the affected parties and communities to explain the project and its effects, and to receive their oral or written comments;
 - (c) ensure that appropriate notices are sent out at least one week prior to the meetings and that the venue and times of the meetings are convenient for the affected communities and the other concerned parties; and
 - (d) ensure in consultation with [NEMA] that a suitably qualified coordinator is appointed to receive and record both oral and written comments and any translations thereof received during all public meetings for onward transmission to [NEMA].



What Courts have said on Participation

The High Court noted that one of the reasons for conducting public participation is to “help identify and address environmental problems at an early stage. This helps to save reaction-time, energy and the scarce financial resources, at least in the long run. In addition, it improves the reactive and, often, adversarial nature of government action which operates by promising solutions to environmental problems mostly post-facto, and only following an actual complaint by a citizen.” *Mohamed Ali Baadi Case* (cited at n14).⁴¹

Similarly in *R v North and East Devon Health Authority, Ex Parte Coughlan*⁴² (quoted in many cases) the Court notes “it is common ground that, whether or not consultation of interested parties and the public is a legal requirement, if it is embarked upon it must be carried out properly. To be proper, consultation must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be given for this purpose; and the product of consultation must be conscientiously taken into account when the ultimate decision is taken”. The last sentence suggests that the product of consultation cannot simply be wished aside – this would defeat the purpose of requiring public participation.

*NET in Save Lamu & 5 others vs. National Environmental Management Authority*⁴³ has also stated that “additionally human beings are justifiably concerned about the environmental impacts of projects to their location and especially where those projects are novel in nature. These environmental impacts are not restricted to the ecological effects alone but extend to other wider areas that affect their lives like the health impacts to them and their families, to their livelihood and economic opportunities, socio-cultural heritage and traditions. Being concerned about all these environmental effects of a project the people most affected by a project must therefore have a say on each and every aspect of the project and its impact. In carrying out a consultative process, it is not a must that every person must support the project nor can a proponent address every unreasonable demand and suggestion, but it is vital that even the most feeble of voices be heard and views considered. It is presumptuous for a proponent ... to proceed with the EIA study, identify the impacts and then unilaterally provide for mitigation measures in complete disregard of the people ... and their views”.

This phase of consulting members of the public who may be affected by the project must be carried out whether or not consultation was carried out during the scoping exercise. Provision of information to project affected persons in their local language is particularly important to enable understanding of the nature of the project but also to lessen vulnerability to misinformation.

At the same time as it sends the EIA study report to the lead agencies for comment, NEMA must publish the report and invite members of the public to make either oral or written comments. For this purpose, NEMA must⁴⁴:

- (a) publish for two successive weeks in the Gazette and in a newspaper with a nation-wide circulation and in particular with a wide circulation in the area of the proposed project, a public notice once a week inviting the public to

- submit oral or written comments on the environmental impact assessment study report; and
- (b) make an announcement of the notice in both official and local languages at least once a week for two consecutive weeks in a radio with a nationwide coverage;
 - (c) the invitation for public comments under this Regulation shall state –
 - i. the nature of the project (summary description of the project - NEMA is required to ensure its website contains a summary of the EIA study report);
 - ii. the location of the project;
 - iii. the anticipated impacts of the project and the proposed mitigation measures to respond to the impacts;
 - iv. the times and place where the full report can be inspected; and
 - v. the period within which the Authority shall receive comments (a period not exceeding sixty days for the submission of oral and written comments – Note; this period can be extended by NEMA on request by any person to afford reasonable opportunity for that person to make oral or written comments).

Upon receiving oral or written comments from lead agencies and members of the public, NEMA can hold a public hearing. The public hearing is presided over by a person appointed by NEMA, who should be suitably qualified to run the hearing. The public should be notified of the meeting at least 1 week in advance, through notice in at least one daily newspaper of national circulation and one newspaper of local circulation; and at least two announcements in the local language of the community and the national language through radio with a nation-wide coverage. The venue for the public hearing must be convenient and accessible to persons who are likely to be affected by the project. At the hearing, the developer must be given an opportunity to present the project and to respond to issues arising during the hearing. After the hearing ends, the person appointed to preside by NEMA compiles a report and submits it to NEMA⁴⁵.

“From the evidence ... the Tribunal formed the impression that the conduct of the [public hearing] at Kwasasi fell short of that contemplated by the regulations. The Kwasasi meeting was not a consultative meeting to explain the nature of the project and its impact as required by the Regulations. It fast degenerated into a popularity contest, engulfed by an atmosphere of tension, where the participants were split into two groups and a poll of some sort was conducted to establish the numbers who supported as opposed to those against the project. There was a lack of true and genuine engagement on the merits and demerits of the project ... an expert ... complained about the manner in which participation was conducted as he felt it was more of a routine check-off approach”. National Environmental Tribunal (NET) in the *Save Lamu* case (above).⁴⁶

Additionally, in the same case, the Appellants faulted the holding of the public hearing not only at a venue not easily accessible by public transport to a majority

of persons likely to be affected by the project, but also for holding the hearing on a Friday, which was a day of prayer for the majority, thus affecting attendance.

But what about public participation in low or medium risk project decisions? Earlier, this booklet outlined the procedure for low or medium risk projects. The observant reader will have noticed that there was no discussion of public involvement about these projects. EMCA was passed well before the 2010 Constitution which makes public participation a national value. It seems clear that even a grant of approval after a project report ought not to happen unless there has been an adequate opportunity for public participation. However, we should not forget that other law – particularly the planning law (see the 2019 Physical and Land Use Planning Act) – may also provide for participation.

What is adequate public participation?

Public participation in decisions whether to grant approval for developments that may affect the environment has been recognised as very important for a long time. And the 2010 Constitution recognises it; one of the duties of the state is to: encourage public participation in the management, protection and conservation of the environment (Article 69).

Effective public participation requires that:

- the public be given adequate notice of the opportunity of participating, including how to submit their views;
- that the chance to participate is genuine (the decision has not already been made), and that venues are accessible, and the approach suitable for the participating groups, and for individuals such as those with disability;
- that the material needed to make an informed input is available: early enough, in enough copies, in language that is understood by the participants, and full enough to explain the situation;
- that public input is taken seriously; and
- that there is feedback as to how public input has been taken into account.

Critique

“Public participation during EIA process in Kenya’s renewable energy sub-sector ... lacks the merits of the international best practice operating principles because it is not initiated early and is not sustained throughout the EIA process; it is not well planned and does not focus on negotiable issues; information diffusion and capacity building is too limiting and prohibiting by design, location and language; cultural, social, economic and political dimensions are mostly ignored and facilitators are interested parties most likely not neutral. The outcome of such a public participation for an EIA process seldom supports informed environmental decisions and hence cannot contribute to environmental risk management.” Omenge and ors. “Public Participation in Environmental Impact Assessment...” (See citation above).

What happens if people fail to follow the law?

Failing to do what the law requires is usually a crime, and the penalties may be severe. Section 138 of EMCA and Regulation 45 of the 2003 EIA regulations say that it is a criminal offence to –

- (a) fail to prepare and submit a project report to [NEMA] required by the Act or regulations 7 and 8;
- (b) fail to prepare and submit an environmental impact assessment study report required by regulations 18 and 19;
- (c) breach of any condition of any licence or certificate issued under these Regulations;
- (d) fraudulently make a false statement in a project report or environmental impact assessment study report;
- (e) fraudulently alter a project report or an environmental impact assessment study report;
- (f) fraudulently make a false statement in an environmental audit;
- (g) fail to inform the [NEMA] of a transfer of an environmental impact assessment licence in accordance with regulation 26; or
- (h) after an audit report is submitted fail to implement any mitigation measures specified under regulation 37.

The penalties are serious, though rather confusingly set out in the Act and regulations. They are usually the possibility of imprisonment for several years, or a fine of sometimes up to five million shilling, or both a fine and imprisonment.



Challenging NEMA's decisions

A decision of NEMA may be challenged: whether it is to grant an EIA licence or to refuse one.

First appeal to the National Environment Tribunal (NET)

Any person who feels dissatisfied with any decision of NEMA's under section 129(1) of EMCA may appeal to the National Environmental Tribunal. If the decision is to refuse, the developer may appeal. If the decision is grant the licence, someone else may appeal. But the expression used in the Act is that "persons aggrieved" may appeal. This expression usually means people who can show that they are particularly affected – they can show some impact on themselves of the decision.

The appeal to NET must be made within 60 days after the decision challenged was made.⁴⁸

Having heard an appeal, NET can make any of the following decisions (section 129(3) of EMCA):

- (a) confirm, set aside or vary the order or decision in question;
- (b) exercise any of the powers which could have been exercised by [NEMA] 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; (this means for instance that if the decision a person wishes to challenge is the grant of an EIA license, they have to obtain orders from the NET stopping the commencing of the construction of a project until a decision on the Appeal is made – this is quite necessary in particular if a person fears irreversible damage may be caused to the environment by the project).
- (e) if satisfied upon application by any party, review any orders made under paragraph (a).

The NET is required by the law to give reasons for its decisions⁴⁹.

Second appeal to the Environment and Land Court (ELC)

If dissatisfied by any decision of NET, a person may challenge that decision before the ELC. This is a court of similar status to the High Court⁵⁰. An appeal to the ELC must be made within 30 days of the decision made by NET⁵¹. Section 130(2) of EMCA says that the decision made by NET does not become effective until the period set to appeal its decision expires, or if any appeal to the ELC is filed, until the appeal is decided.

After hearing the appeal, the ELC may make any of the following orders⁵²:

- (a) confirm, set aside or vary the decision or order in question;
- (b) remit the proceedings to [NET] with such instructions for further consideration,

- report, proceedings or evidence as the court may deem fit to give;
- (c) exercise any of the powers which could have been exercised by the [NET] in the proceedings in connection with which the appeal is brought; or
 - (d) make such other order as it may deem just, including an order as to costs of the appeal or of earlier proceedings in the matter before [NET].

The decision of the ELC is final. That means that no further appeal may be brought.

Other ways to challenge a NEMA decision in court

There are other options available for review of decisions of NEMA and its officers. The first possibility is to apply to the High Court for judicial review - challenging the way the decision was made; for example not giving a chance for opposition to be heard. The second is to file a petition alleging violation of constitutional rights in the Constitutional and Human Rights Division of the High Court - particularly the right to a clean and healthy environment under Article 70.

Preparing to participate in an EIA process

A few common sense guidelines for members of the public who wish to contribute to the EIA process:

- Try to participate at as early a stage as possible, enhancing the chances of making an impact
- Make sure that you know the deadlines for submitting comments
- If possible submit comments in writing, not just orally in a meeting - if you later want to go to court to challenge the decision this will make it easier
- Ensure that you know how to find the EIA report
- Form alliances with other individuals and groups for impact

However, that said, for these two options, it is most likely the High Court will first decide whether it is the most appropriate court to determine the dispute or would it be best handled at the NET or ELC. The High Court has stated that it will allow hearing of a petition on the right to a clean and healthy environment if the dispute is one in which different groups of persons, such as developers, the government, the affected community, non-governmental organizations, and environmental groups, wish to get audience from the court; and in which there are other claims of human rights violations apart from the right to a clean environment.

ADDITIONAL NOTE: Strategic Environmental Assessment (SEA)

There are development projects that have a lot of components and may span a large geographical area. An example is LAPSET (Lamu Port - South Sudan - Ethiopia Transport Corridor).⁵⁴ For such a project, EIAs conducted for the various components cannot give a holistic view of the environmental impacts of the entire project. For such projects, a SEA becomes necessary.

EMCA and the EIA regulations provide that “all government policies, plans and or programs for environmental implementation shall be subjected to a SEA to determine which ones are the most environmentally friendly and cost effective when implemented individually or in combination with others”⁵⁵. The SEA shall

consider the effect of implementation of alternative policy actions particularly:

- (a) the use of natural resources;
- (b) the protection and conservation of biodiversity;
- (c) human settlement and cultural issues;
- (d) socio-economic factors; and
- (e) the protection, conservation of natural physical surroundings of scenic beauty as well as protection and conservation of built environment of historic or cultural significance.

The government and all lead agencies in developing sector or national policies must incorporate principles of SEA.

Why is a SEA important?

(A good explanation is provided in a publication by the Organization for Economic Co-operation and Development (OECD) aimed at improving the way OECD countries and institutions provide support to developing countries)¹:

“SEA helps decision makers reach a better understanding of how environmental, social and economic considerations fit together. Without that understanding, we risk turning today’s development successes into tomorrow’s environmental challenges. In short, SEA helps decision makers think through the consequences of their actions (in other words, the purpose of SEA is to ensure publicly accountable decision-making). SEA is applied at the very earliest stages of decision making both to help formulate policies, plans and programs and to assess their potential development effectiveness and sustainability. This distinguishes SEA from more traditional environmental assessment tools, such as EIAs, which have a proven track record in addressing the environmental threats and opportunities of specific projects but are less easily applied to policies, plans and programs. SEA is not a substitute for, but complements, EIA and other assessment approaches and tools”.

This means, for example, once plans for LAPSSSET were formulated, they had to be at the very onset, before sourcing for funding and committing to the development of the project, been subjected to a SEA to ensure it was the most suitable development type for the region in compliance with the principle of sustainable development⁵⁶. It is particularly important that the SEA is done before the government commits to a project since the SEA is intended to provide a dispassionate and objective evaluation of government plans and projects.

Summary of the stages in the issuance of an EIA licence

Low and Medium Risk Projects	High Risk Projects
Preparation of project report by Developer	Scoping exercise is carried out by Developer - including development of draft TORs
Submission of project report by Developer to NEMA	Submission of scoping report by Developer and approval of TORs by NEMA
Decision by NEMA on project report: <ul style="list-style-type: none"> • Report sufficient and doesn't disclose significant risk to environment - license issued • Report not sufficient and discloses significant risk to environment - direct preparation of a comprehensive project report 	EIA study carried out by Developer as per TORs - public participation and consultation of relevant government institutions must be done
Preparation of comprehensive project report by Developer	Submission of EIA study report by Developer to NEMA
Submission of comprehensive project report by Developer to NEMA	<ul style="list-style-type: none"> • Decision on EIA study report by NEMA: Before making decision NEMA must provide report to lead agencies for their input, publish EIA study report in Gazette and 2 national newspapers for oral and written comments by members of the public, and may conduct a public hearing • EIA study approved by NEMA and EIA license issued
Decision on comprehensive project report by NEMA: <ul style="list-style-type: none"> • Before making decision must provide report to lead agencies for their input • Approval of report and grant of license 	
Appeal to NET against decisions of NEMA and its officers	
Appeal of NET decision to ELC Court	

Endnotes

- ¹Section 2 Environmental Management and Co-ordination Act, Act No. 8 of 1999 (EMCA).
- ²This right is reflected in section 3 of EMCA which provides that everyone is entitled to “a clean and healthy environment including access by any person in Kenya to the various public elements or segments of the environment for recreational, educational, health, spiritual and cultural purposes”. Section 50 of the same Act recognizes the protection of biological diversity; section 51 provides for conservation of biological resources; section 54 provides for protection of environmentally significant areas; and section 54 recognizes the protection of the Ozone Layer.
- ³Additionally, Article 21(1) of the Constitution provides that it is a fundamental duty of the state and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights, of which the right to a clean and healthy environment is one.
- ⁴Philip M. Omenge and others, “Public Participation in Environmental Impact Assessment and its Substantive Contribution to Environmental Risk Management: Insights From EIA Practitioners and Other Stakeholders in Kenya’s Renewable Energy Sub-Sector”, WIT Transactions on Ecology and the Environment, Vol. 237, 2019, doi:10.2495/ESUS190121.
- ⁵Appeal No. 12/2012 (March 13, 2014) - a local community member challenged the environmental clearance approving a 3x800MW super thermal power plant in Karnataka (para. 76).
- ⁶Article 260 of the Constitution - natural resources are “the physical non-human factors and components, whether renewable or non-renewable, including -
- (a) sunlight
 - (b) surface and groundwater
 - (c) forests, biodiversity and genetic resources, and
 - (d) rocks, minerals, fossil fuels and other sources of energy.
- ⁷Regulation 2 of Environmental (Impact Assessment and Audit) Regulations, 2003.
- ⁸Public land also includes: government forests; government game reserves, water catchment areas, national parks, government animal sanctuaries, and specially protected areas; all roads and thoroughfares provided for by an Act of Parliament; all rivers, lakes and other water bodies as defined by an Act of Parliament; the territorial sea, the exclusive economic zone and the sea bed; the continental shelf; and all land between the high and low water marks - Article 62 Constitution of Kenya.
- ⁹Land in Kenya is categorized into public, community and private land - Articles 62, 63 and 64 Constitution of Kenya.
- ¹⁰Refer to n1 above. Also note that sustainable development is recognized by Article 10(2) (d) of the Constitution.
- ¹¹Section 9 of EMCA.
- ¹²Refer to *Fuel Retailers Association of Southern Africa vs. Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others (CCT67/06) [2007] ZACC 13 (7 June 2007)*, to understand the different responsibilities of policy makers and environmental protection authorities.
- ¹³Refer to n11 above.
- ¹⁴Refer to n1 above.
- ¹⁵[2018] eKLR. See para 174 of judgment.
- ¹⁶These include the Wildlife Conservation and Management Act, No. 47 of 2013; the Water Act, No. 43 of 2016; the Land Act, No. 6 of 2012; and the Forest Conservation and Management Act, No. 34 of 2016. Note that certain sections of these Acts require EIAs to be conducted for various activities. For example: before issuance of permits for water works, the Water Act at section 40 requires an EIA; the Wildlife Conservation and Management Act requires EIAs for applications to vary boundaries or revoke national parks and marine protected areas, to exchange part of a park with private land, to quarry or mine in parks and consumptive

wildlife use (sections 34, 38 and 80(3) respectively); the Land Act section 17 requires plans for the development, management and use of reserved public land subjected to EIAs; and the Forest Conservation and Management Act requires variation of boundaries or revocation of public forests, exchange of forest area with private land, concession on public forests, and quarrying must be subjected to EIAs (sections 34, 36, 44, and 46 respectively).

¹⁷Act No. 8 of 1999; lastly amended in 2019, EMCA describes itself as “an Act of Parliament to provide for the establishment of an appropriate legal and institutional framework for the management of the environment and for matters connected therewith and incidental thereto”.

¹⁸Section 58(1) of EMCA.

¹⁹Regulations 6 and 7(1) of the EIA Regulations.

²⁰Regulation 7(1) of the EIA Regulations.

²¹Regulation 7(3) of EIA regulations.

²²Regulation 7(4) of EIA regulations.

²³Why is this important? In the **Mohamed Ali Baadi Case**, the Court noted it is necessary to “assess, consider and report on the true costs of a project, policy, plan or program. These true costs include a reflection of the extent of impacts on health, welfare loss (including both monetary losses associated with lost opportunities for community members directly and indirectly associated with the project, policy, plan or program as well as losses which cannot be monetarily measured); reduction of life expectancy associated with increased diseases resulting from air and water pollution; a decrease in the quality of life associated with these same toxins, and so forth”. This helps decision-makers ascertain whether the proposed projects provides economic benefits that far outweigh negative environmental consequences; in other words inconsequential environmental effects and significant economic benefits.

²⁴Lead agency means “any government ministry, department, parastatal, state corporation or local authority, in which any law vests functions of control or management of any element of the environment or natural resources” – regulation 2 of EIA regulations. Examples are bodies with mandates in human rights protection (e.g. Kenya National Commission on Human Rights), health, industry, law (Attorney General), public administration, public works, tourism, wildlife resources, water resources, forestry resources, labor, information, lands and settlement (including National Land Commission).

²⁵Regulations 8 – 9 of EIA regulations.

²⁶Regulation 10 of EIA regulations, read in light of the 2019 EIA regulations amendment, particularly to Regulation 7.

²⁷Regulation 11 of EIA regulations.

²⁸Regulation 16 of EIA regulations.

²⁹Regulation 18(1) of EIA regulations.

³⁰Section 60 of EMCA and Regulation 21 of EIA regulations.

³¹Note, at this stage NEMA may constitute a Technical Advisory Committee to assist it in reaching a suitable decision on the EIA Study (refer to Section 61 of EMCA and Regulation 5 of EIA regulations).

³²Section 62 of EMCA.

³³Regulation 23 of EIA regulations.

³⁴“The EIA must identify the direct and indirect effects of a project on the following factors: human beings, the fauna, the flora, the soil, water, air, the climate, the landscape, the material assets and cultural heritage, as well as the interaction between these various elements” – **Mohamed Ali Baadi Case**.

³⁵Refer to n33 above.

³⁶Section 63 of EMCA and Regulation 24 of EIA regulations.

³⁷Section 64 of EMCA.

³⁸In **Moffat Kamau & 9 others vs. Aelous Kenya Limited & 9 others [2016] eKLR** the ELC quashed EIA licences issued upgrading a power project to 60MW and later to a 61MW

project on new sites situated in 38 plots without NEMA requiring a fresh EIA to be provided because it was contrary to EMCA, 1999 and to the EIA Regulations, 2003.

³⁹Section 67 of EMCA.

⁴⁰Regulation 17 of EIA regulations.

⁴¹Also refer to *Mui Coal Basin Local Community & 15 others vs. Permanent Secretary Ministry of Energy & 17 others [2015] eKLR*. The Court gave a detailed analysis of public participation in the context of a concession to mine coal in Mui Basin.

⁴²[2001]Q.B. 213, 258.

⁴³[2019] eKLR.

⁴⁴Section 59 of EMCA and Regulation 21 of EIA regulations.

⁴⁵Regulation 22 of EIA regulations.

⁴⁶In India, members of an affected community appealed the granting of an environmental clearance (“EC”) for a coal mining project based in part on an inadequate public hearing. In *Jindal Gare Appeal No. 3/2011 (T) (NEAA No. 26 of 2009)*:

“The petitioners complained that the EC for the project should not have been granted, in part because the public hearing conducted as part of the review of the EIA Report was inadequate for many reasons; it was held in a village that was neither at the project site nor in close proximity to it - the village was a remote place which made it difficult for poor people affected by the project to participate and ventilate their grievances; a summary of the EIA Report was not made available to the public as required by law, nor was it made available in the local language - without proper information about the project it was not possible for the project affected people of the area to meaningfully participate in the public hearing; and finally at the start of the hearing there was some commotion and the presiding officer declared the Public Hearing cancelled. Therefore, the petitioners complained that the Environment Conservation Board illegally declared that the Public Hearing as complete”.

⁴⁷Section 129(1) provides that any of the following decisions by NEMA, its officers or committees can be appealed to NET:

“Any person who is aggrieved by -

- (a) the grant of a license or permit or a refusal to grant a license or permit, or the transfer of a license or permit, under this Act or its regulations;
- (b) the imposition of any condition, limitation or restriction on the persons’ license under this Act or its regulations;
- (c) the revocation, suspension or variation of the person’s license under this Act or its regulations;
- (d) the amount of money required to be paid as a fee under this Act or its regulations; [and]
- (e) the imposition against the person of an environmental restoration order or environmental improvement order by [NEMA] under this Act or its Regulations”.

⁴⁸It is critical to note that once an appeal has been filed, especially in relation to an EIA licence, it is up to the Applicant (project proponent) to prove that they fully complied with the law in preparing the EIA study report. In the *M.P. Patil v. Union of India Case*, the National Green Tribunal of India noted, “the onus is not on the objectors to prove their objections by leading scientific evidence at that stage... It was, in fact, for the [project proponent] to show that the various apprehensions of the objectors were not well-founded, and that the project is not likely to do any environmental damage or cause deprivation of the livelihood and income of the project-affected persons. The onus squarely lies upon the [project proponent] to bring the establishment and operation of the project within the ambit of balanced sustained development” (para 87).

⁴⁹Rule 38 of the NET Procedure Rules, 2003.

⁵⁰Article 162(2) of the Constitution.

⁵¹Section 130(1) of EMCA.

⁵²Section 130(4) of EMCA.

⁵³Refer to the ***Mohamed Ali Baadi Case***, at paras. 92 - 108 for a discussion on this point.

⁵⁴The LAPSET project as initially designed involved the following components, namely: a 32-berth port at Manda Bay in Lamu; an inter-regional standard gauge railway from Lamu to Juba and Addis Ababa, the South Sudan and Ethiopian capitals respectively; a road network and oil pipelines from South Sudan and Ethiopia; an oil refinery at Bargoni; three international airports and three resort cities, namely; Lamu, Isiolo and Lake Turkana shores. Additionally, it was designed to include a multi-purpose High Grand falls Dam along the Tana River.

⁵⁵Section 57A of EMCA and regulation 42 of EIA regulations.

⁵⁶This was the finding by the High Court in the ***Mohamed Ali Baadi Case***.

ANNEXES:

1. Low and medium risk projects in the Second Schedule of EMCA

No.	Low Risk Projects	Medium Risk Projects
1.	Establishment of places of worship including churches, mosques and temples	Urban Development including - (a) Establishment of multi-dwelling housing developments of not exceeding one hundred units (b) Tourism and related infrastructure (c) Hotels with bed capacity not exceeding one hundred and fifty (d) Shopping centers, commercial centers and complexes, business premises, shops and stores not exceeding ten thousand square meters
2.	Community based and social projects including sport facilities, stadia, social halls	Transportation including - (a) Construction and rehabilitation of roads including collectors and access roads (b) Construction of a light rail transit (c) Construction of jetties, marinas, piers and pontoons (d) Rehabilitation works of airports and airstrips (e) Helipads (f) Parking facilities (g) Construction of bridges
3.	Community water projects including boreholes, water pans, sand dams and sub-surface dams	Water resources and infrastructure, including - (a) Drilling for purposes of utilizing ground water resources and related infrastructure (b) Water abstraction works (c) Water supply and distribution infrastructure
4.	Dispensaries, health centers and clinics	Artisanal mining including quarrying of - (a) Precious metals and gemstones (b) Limestone and dolomite (c) Harvesting of aggregate, sand, gravel, soil, clay, stone and slate (d) Gypsum (e) Pozollana (f) Carbon dioxide (g) ferrous and non-ferrous ores
5.	Livestock holding grounds and cattle dips	Forestry related activities, including - (a) Timber harvesting in plantation forests (b) Reforestation and afforestation (c) Wood preservation or treatment facilities

No.	Low Risk Projects	Medium Risk Projects
6.	Expansion or rehabilitation of markets	Agriculture and related activities, including – (a) Medium-scale agriculture not exceeding one hundred hectares (b) Medium size grain storage (c) Medium size agricultural and livestock produce storage facilities (d) Aquaculture not exceeding one hectare (e) Medium scale irrigation projects
7.	Car and bus parks	Medium scale processing and manufacturing industries, including – (a) Brick and earth-ware manufacture (b) Abattoirs and meat-processing plants (c) Fish-processing plants (d) Plants for the construction or repair of aircrafts or railway equipment (e) Plants for the manufacture of tanks, reservoirs and sheet-metal containers (f) Plants for manufacturing or recycling of plastics or paper (g) Plants for manufacturing pharmaceuticals (h) Plants for the manufacture of coal briquettes (i) Distilleries (j) Any other food-processing plants or agro-based processing plant (k) Go-downs for storage and warehouses
8.	Local roads and facility access roads	Power and infrastructure projects, including – (a) Hydropower development not exceeding ten megawatts (b) Electrical sub-stations (c) Pumped-storage schemes (d) Cogeneration of power (e) Low voltage power transmission lines (f) Solar power farms or plants
9.	Business premises including shops, stores, urban market sheds	Hydrocarbons projects, including – (a) Service stations (b) LPG filling plant (c) Lubricant blending facilities
10.	Cottage industry, jua kali sector and garages	Waste disposal, including – (a) Waste transfer stations or storage facilities (b) Composting sites or plants (c) Removal and onsite disposal of asbestos

No.	Low Risk Projects	Medium Risk Projects
11.	Small scale rehabilitation, maintenance and modernization of projects	Packaged treatment plants or onsite waste water treatment plants
12.	Schools and related infrastructure for learners not exceeding one hundred	Biofuels processing plants
13.	Standard warehouses not exceeding one thousand four hundred square meters	Telecommunication infrastructures
14.		Expansion of tertiary institutions and related infrastructures

2. High Risk projects under the Second Schedule of EMCA

No.	High Risk Projects	Explanatory Note
1.	General	(a) An activity out of character with its surrounding (b) Any structure of a scale not in keeping with its surrounding
2.	Changes in land use including	(c) Major changes in land use (d) Large scale resettlement schemes
3.	Urban Development including	(a) Designation of new townships (b) Establishment or expansion of industrial estates (c) Establishment or expansion of recreational areas in national parks, national reserves, forests, nature reserves and any areas designated as environmentally sensitive (d) Establishment of shopping centers, commercial centers and complexes (e) Establishment of hospitals (f) Hotels with a bed capacity exceeding one hundred and fifty (g) Establishment of new housing developments exceeding one hundred housing units (h) Establishment of schools and other learning institutions exceeding one hundred learners (i) Other related urban developments
4.	Transportation and related infrastructure projects, including	(a) All new major roads including trunk roads (b) Railway lines (c) Airports and airfields (d) Oil and gas pipelines (e) Harbours and ports (f) Construction of tunnels and channels (g) Metro transport facilities (h) Underground transport works

No.	High Risk Projects	Explanatory Note
5.	Water resources and related infrastructure including	<ul style="list-style-type: none"> (a) Storage dams and barrages (b) River diversions and water transfer between catchments (c) Flood control schemes (d) Sea walls (e) Water abstraction works
6.	Mining and other related activities including	<ul style="list-style-type: none"> (a) Precious metals (b) Slate firms (c) Gemstones (d) Ferrous and non-ferrous ores (e) Coal (f) Phosphates (g) Limestone and dolomite (h) Quarrying of stone and slate (i) Harvesting of aggregate, sand, gravel, soil and clay (j) Exploration for the production of petroleum and minerals in any form
7.	Forestry related activities including	<ul style="list-style-type: none"> (a) Clearance of forest areas (b) Reforestation and afforestation with alien species (c) Introduction of alien species (d) Excisions of gazetted forests (e) Conversion of forests for whatever purposes (f) Any projects located within forest reserves such as construction of dams or other control structures that flood large areas
8.	Agriculture including	<ul style="list-style-type: none"> (a) Aerial spraying (b) Large scale agriculture exceeding one hundred hectares (c) Introduction of new crops and animals (d) Large scale irrigation exceeding one hundred hectares (e) Major developments in biotechnology including the introduction and testing of genetically modified organisms (f) Biofuel plantations
9.	Processing and manufacturing Industries including	<ul style="list-style-type: none"> (a) Minerals or ores refining and processing (b) Large scale brick and earth ware manufacture (c) Cement manufacturing plants and lime processing (d) Glass works (e) Fertilizer manufacture or processing (f) Explosive plants (g) Tanneries (h) Abattoirs handling more than one hundred animals per day and meat processing plants (i) Brewing and malting (j) Bulk grain processing and storage plants (k) Large scale fish processing plants

No.	High Risk Projects	Explanatory Note
		(l) Pulp and paper mills (m) Heavy manufacturing plants (n) Lead smelting and processing plants (o) Edible oil plants (p) Steel mills (q) Sugar factories (r) Any other chemical works and processing plants
10.	Power and infrastructure projects, including	(a) Thermal and hydropower development exceeding ten megawatts (b) Geothermal development (c) Wind farms (d) Nuclear reactors and nuclear plants (e) High voltage electrical transmission lines
11.	Hydrocarbon projects, including	(a) Depots and refinery facilities for hydrocarbons (b) Depots for natural gas (c) Oil and gas fields development (d) Oil refineries and petro-chemical works
12.	Waste disposal works, including	(a) Sewerage works and waste water treatment plants (b) Installation for disposal of industrial wastes (c) Installation of incinerators (d) Sanitary landfill sites (e) Hazardous waste treatment or disposal facilities (f) Facilities for disposal of solid or liquid hazardous waste (g) Sludge treatment facility (h) E-waste recycling facilities (i) Waste oil recycling facilities (j) Waste tyre processing and recycling facilities (k) Commercial asbestos disposal sites
13.	Activities in natural conservation areas, including	(a) Establishment of protected areas, buffer zones, and wilderness areas (b) Actions likely to affect endangered species of flora and fauna (c) Formulation or modification of water catchment management projects (d) Projects for the management of ecosystems especially by manipulating fire and water (e) Commercial exploitation of natural fauna and flora (f) Introduction of alien species of fauna and flora into ecosystems (g) Wetlands reclamation or any projects likely to affect wetlands (h) Projects located in indigenous forests including those outside of gazetted forests (i) Any project in an environmentally sensitive area

No.	High Risk Projects	Explanatory Note
14.	Marine resources exploitation and reclamation, including	(a) Mineral exploitation of resources in the marine areas (b) Reclamation of marine areas (c) Mariculture
15.	Any other project which poses high environmental risks	

3. Issues to be considered in EIA

No.	Second Schedule (issues to be considered in EIAs)
1.	<p>Ecological Considerations -</p> <p>(a) Biological diversity including -</p> <ul style="list-style-type: none"> i. effect of proposal on number, diversity, breeding habits, etc. of wild animals and vegetation ii. gene pool of domesticated plants and animals e.g. monoculture as opposed to wild types <p>(b) Sustainable use including -</p> <ul style="list-style-type: none"> i. effect of proposal on soil fertility ii. breeding populations of fish, game or wild animals iii. natural regeneration of woodland and sustainable yield iv. wetland resource degrading or wise use of wetlands <p>(c) Ecosystem maintenance including -</p> <ul style="list-style-type: none"> i. effect of proposal on food chains ii. nutrient cycles iii. aquifer recharge, water run-off rates etc. iv. a real extent of habitants v. fragile ecosystems
2.	<p>Social considerations including -</p> <ul style="list-style-type: none"> (a) economic impacts (b) social cohesion or disruption (c) effect on human health (d) immigration or emigration (e) communication - roads opened up, closed, rerouted (f) effects on culture and objects of culture value
3.	<p>Landscape -</p> <ul style="list-style-type: none"> (a) views opened up or closed (b) visual impacts (features, removal of vegetation), etc. (c) compatibility with surrounding area (d) amenity opened up or closed, e.g. recreation possibilities
4.	<p>Land uses -</p> <ul style="list-style-type: none"> (a) effects of proposal on current land uses and land use potentials in the project area (b) possibility of multiple use (c) effects of proposal on surrounding land uses and land use potentials

No.	Second Schedule (issues to be considered in EIAs)
5	Water - Important aspects to consider are the effects of the proposal on - (a) water sources (quantity and quality) - i. rivers ii. springs iii. lakes (natural and man-made) iv. underground water v. oceans (b) drainage patterns/drainage systems

4. Sample Templates

Template 1 Project Report (from the First Schedule EIA regulations, 2003)

FORM 1

(r. 6)

Application Reference No.

ENVIRONMENT MANAGEMENT AND CO-ORDINATION ACT
SUBMISSION OF PROJECT REPORT
PART A – DETAILS OF PROPONENT

A1. Name of Proponent (Person or Firm):

A2. PIN No.:

A3. Address:

A4. Name of contact person:

A5. Telephone No.: A6. Fax No.:

A7. E-mail:

PART B – DETAILS OF THE PROJECT REPORT

B1. Title of the proposed project:

B2. Objectives and scope of the project:

B3. Description of the activities:

B4. Location of the proposed project:

PART C – DECLARATION BY THE PROPONENT

I hereby certify that the particulars given above are correct and true to the best of my knowledge.

Name: Position:

Signature:

On behalf of:

Date:

(Firm name and seal)

PART D – DETAILS OF ENVIRONMENTAL IMPACT ASSESSMENT EXPERT

Name (individual/firm):

Certificate of registration No.:

Address:

Tel: Fax: E-mail:

PART E – FOR OFFICIAL USE

Approved/not approved:

Comments:

.....

.....

Officer: Sign: Date:

NB: 1. If the Project Report does not contain sufficient information required under the Environmental (Impact Assessment and Audit) Regulations the applicant may be requested to give further information concerning the project or be notified of any defects in the application and may be required to provide the additional information.

FIRST SCHEDULE, FORM 1—continued

2. Any person who fraudulently makes a false statement in a project report or alters the project report commits an offence.

Important Notes: Please submit the following—

- (a) Three copies of this form;
- (b) 10 copies of the project report;
- (c) the prescribed fees, to:

Director-General
 The National Environment Management
 Authority.

FORM 2

(r. 19)

Application Reference No.:

FOR OFFICIAL USE

ENVIRONMENT MANAGEMENT AND CO-ORDINATION ACT

SUBMISSION OF ENVIRONMENTAL IMPACT ASSESSMENT STUDY REPORT

PART A – DETAILS OF PROPONENT

- A1. Name of proponent (Person or Firm)
- A2. PIN No.
- A3. Address
- A4. Name of contact person
- A5. Telephone No. A6. Fax No.
- A7. E-mail

PART B – DETAILS OF THE ENVIRONMENTAL IMPACT ASSESSMENT STUDY REPORT

- B1. Title of the proposed project
-
- B2. Objectives and scope of the project
-
- B3. Description of the activities
-
- B4. Location of the proposed project
-

PART C – DECLARATION BY THE PROPONENT

I hereby certify that the particulars given above are correct and true to the best of my knowledge.

Name Position

Signature On behalf of

Date

(Firm name and seal)

PART D – DETAILS OF ENVIRONMENTAL IMPACT ASSESSMENT EXPERT

Name(individual/firm)

Certificate of registration No.

FIRST SCHEDULE, FORM 2—continued

Address

Tel Fax E-mail

PART E – OFFICIAL USE

Approved/not approved

Comments

Officer Sign Date

Important Notes: Please submit the following—

- (a) Three copies of this form;
- (b) 10 copies of the project study report;
- (c) the prescribed fees, to:

Director-General
The National Environment Management
Authority.

FORM 3

(r. 24)

Application Reference No.

Registration No.

FOR OFFICIAL USE

ENVIRONMENTAL MANAGEMENT AND CO-ORDINATION ACT

ENVIRONMENTAL IMPACT ASSESSMENT LICENCE

This is to certify that the Project Report/Environmental Impact Assessment Study Report
received from (name
of individual/firm) (address) submitted to the National
Environment Management Authority in accordance with the Environmental Impact Assessment and
Audit Regulations regarding (title of project;
whose objective is to carry on

.....
(briefly describe purpose) located at (locality and District;
has been reviewed and a licence is hereby issued for implementation of the project, subject to
attached conditions.

Dated this day, 20.....

Signature

(Seal)

.....
Director-General

*The National Environmental Management
Authority*

FIRST SCHEDULE, FORM 3—continued

Conditions of Licence:

1. This licence is valid for a period of (time within which the
project should commence) from the date hereof.
2. The Director-General shall be notified of any transfer/variation/surrender of this licence.

FORM 15

(r. 29)

Form No.

Reference No.

FOR OFFICIAL USE

ENVIRONMENTAL MANAGEMENT AND CO-ORDINATION ACT

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY

APPLICATION FOR ACCESS TO INFORMATION

PART A – DETAILS OF APPLICANT

- A1. Name:
- Address:
-
-
- Telephone: Fax:
- Email:
- Profession:
- Date:

FIRST SCHEDULE, FORM 15—continued

- A2. NAME OF EMPLOYER (if applicable):
- Address:
-
- Telephone: Fax:
- E-mail:
- Designation:

PART B – INFORMATION DETAILS

- B1. TYPE OF INFORMATION REQUIRED (tick as appropriate)
- Project Report.
- Environmental Impact Assessment Study Report.
- Environmental Audit Report.
- Strategic Environmental Assessment Report.
- Environmental Monitoring Report.
- Record of Decision (ROD) for Environmental Impact Assessment Approvals.
- Licences for Project Reports.
- Licences for Environmental Impact Assessment.
- Environmental Impact Assessment Experts (Individuals).
- Environmental Impact Assessment Experts (Firms).
- B2. DOCUMENT
- Title of the document
- Author
- Year
- B3. HOW THE INFORMATION IS EXTRACTED? Reading
- Inspection/viewing
- B4. PURPOSE FOR REQUIRING THE INFORMATION
- Educational Research Interested party
- Affected party

Important note—

A prescribed fee of Kshs. 200 will be charged for access information per record/register.

A Guide on the Basics of Environmental Impact Assessments in Kenya



IN THE NATIONAL ENVIRONMENT TRIBUNAL AT NAIROBI

TRIBUNAL APPEAL NO. OF 2019
 KATIBA INSTITUTE APPELLANT
 -VERSUS-
 NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY 1ST RESPONDENT
 XXXX COMPANY LIMITED 2ND RESPONDENT

NOTICE OF APPEAL Rule 4 (f)

1. APPELLANTS:

Organization: Katiba Institute
 Individuals: xxxxxxx
 Physical address for service: Rose Avenue, Off Argwings Kodhek Road
 Postal Address: P.O. Box 26586 - 00100, Nairobi
 Telephone No: xxxxxxx

2. 1ST RESPONDENT:

Office: Statutory Authority (National Environment Management Authority)
 Physical address for service: Popo Road, South C, Off Mombasa Road
 Postal Address: P.O. Box 67839-00200 Nairobi
 Telephone No: 020 210 1370

3. 2ND RESPONDENT:

Business: xxxx Company Limited
 Physical address for service: xxxxxxx
 Postal Address: xxxxxxx
 Telephone No: xxxxxx

4. DECISION/ACTION APPEALED AGAINST (ATTACH COPY IF ANY):

The reviewing and issuing of Environmental Impact Assessment License No. xxxxx following Application Reference No. xxxxx by the National Management Authority and all public officers involved in the decision at the Authority to xxxxx Company Limited, P.O. Box xxxxx, Nairobi for the construction of xxxxxxx located at xxxxxx.

Copy of the EIA License	P. x of the Supporting Documents
Statement of Particulars	P. x of this Notice of Appeal

5. SUMMARY OF GROUNDS OF APPEAL (ATTACH A DETAILED STATEMENT):

1. xxxxxxx
2. xxxxxxx
3. xxxxxxx

Statement of the Purpose of the Hearing	P. x of this Notice of Appeal
Detailed Statement of Grounds of the Appellants' Dissatisfaction	P. x of this Notice of Appeal
List of Documents	P. x of this Notice of Appeal

6. OTHER RELATED MATTERS FILED IN ANY COURT OR TRIBUNAL (IF ANY):

To our knowledge, no other related matters have been filed in any court or tribunal.

7. THE RELIEF WHICH THE APPELLANT IS SEEKING BEFORE THE TRIBUNAL:

1. xxxxxx

8. SIGNATURE OR MARK OF THE APPELLANT/ADVOCATE:

9. Dated at this Day of 2019

10. Drawn and filed by:
Advocate

11. Fees payable Ksh:
Receipt No:
Action taken
Date:

12. For Official use only:

Note: To be completed in quadruplicate



IN THE NATIONAL ENVIRONMENT TRIBUNAL AT NAIROBI

TRIBUNAL APPEAL NO. OF 2019
 KATIBA INSTITUTE APPELLANT
 VERSUS
 NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY 1ST RESPONDENT
 XXXXX COMPANY LIMITED 2ND RESPONDENT

STATEMENT OF PARTICULARS Rule 4 (3)(b)

1. THAT this statement provides the particulars leading up to the decision by the National Environmental Management Authority to issue xxxx Limited Company with an Environmental Impact Assessment Licence for construction of xxxxx located in xxxxx.

Background

2. xxxxx

Environmental Impact Assessment Study

3. xxxxxx

Environmental Impact Assessment Study Report

4. xxxxxx

The Decision - Issuing of an EIA Licence

5. xxxxxxx

6. THAT on the basis of the above particulars, Katiba Institute decided to lodge an appeal with the National Environmental Tribunal on the decision by NEMA to issue xxxx limited company with an EIA Licence for the Project.

That is all we have to state.

SIGNATURE OR MARK OF THE APPELLANT/ADVOCATE:

Dated at this Day of 2019



IN THE NATIONAL ENVIRONMENT TRIBUNAL AT NAIROBI

TRIBUNAL APPEAL NO. OF 2019
 KATIBA INSTITUTE APPELLANT
 VERSUS
 NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY 1ST RESPONDENT
 XXXX COMPANY LIMITED 2ND RESPONDENT

STATEMENT OF THE PURPOSE OF THE HEARING Rule 4 (3) (c)

1. xxxxxxx
2. xxxxxxx
3. xxxxxxx

SIGNATURE OR MARK OF THE APPELLANT/ADVOCATE:

Dated at this Day of 2019

Drawn and filed by:
Advocate

5. How to Find Out More about EIAs

Here you will find readily available sources (on the internet) on EIA generally and specifically for Kenya.

Not specific to Kenya

- Publications on whole process:

e-Law Guidebook for Evaluating Mining Project EIAs

This Guide, written for civil society, covers:

- Overview of Mining and its Impacts
- Overview of the EIA Process
- Reviewing a Typical EIA for a Mining Project
- How to be an Effective Participant in the EIA Process
- EIA Review Checklist

Available at <https://www.elaw.org/files/mining-eia-guidebook/Full-Guidebook.pdf>

Though it focuses on mining, the principles are broadly applicable.

Other websites that might be useful include the International Institute for Sustainable Development; this link: <https://www.iisd.org/learning/eia/examples/> takes you to some examples.

Specific to Kenya

The 2003 regulations, available at <http://www.nema.go.ke/images/Docs/Regulations/Revised%20EIA%20Regulations-1.pdf>

The 2019 Environmental Management and Co-ordination Act (Impact Assessment and Audit) (Amendment) Regulations, 2019 and the Environmental Management Co-ordination Act (Amendment of the Second Schedule), 2019 can be downloaded from <http://kenyalaw.org/kl/index.php?id=9393>

Code of Practice and Professional Ethics for Integrated Environmental Assessment and Audit Experts can be downloaded from <http://www.nema.go.ke/images/Docs/CodeofpracticeandprofessionalEthics.pdf>

List of EIA Experts 2019 can be downloaded from http://www.nema.go.ke/index.php?option=com_content&view=article&id=18&Itemid=156

Previous EIA reports can be found on the NEMA website at <https://tinyurl.com/EIArepsK>

A Guide on the Basics of Environmental Impact Assessments in Kenya



Katiba Institute

Rose Avenue, Hurlingham, P.O. Box 26586-00100, Nairobi
Cell: +254 704 594962 • Email: info@katibainstitute.org
www.katibainstitute.org