

# CARBON RIGHTS IN THE CONTEXT OF REDD+ IN KENYA

## A LEGAL ANALYSIS



Indigenous Livelihoods Enhancement Partners  
ILEPA  
"Enhancing Indigenous Resiliency"





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## List of Abbreviations

<b>ACCU</b>	Australian Carbon Credit Unit
<b>AD</b>	Avoided Deforestation
<b>CCP</b>	Core Carbon Principles
<b>CER</b>	Clean Energy Regulator
<b>CGT</b>	Capital Gains Tax
<b>COP</b>	Conference of the Parties
<b>CFI</b>	Carbon Farming Initiatives
<b>DRC</b>	Democratic Republic of Congo
<b>DNA</b>	Designated National Authority
<b>ELC</b>	Environment and Land Court
<b>EMCA</b>	Environmental Management and Coordination Act
<b>ERPA</b>	Emission Reduction Purchase Agreement
<b>ER</b>	Emission Reduction
<b>ERR</b>	Emission Reduction Right
<b>EU</b>	European Union
<b>FCMA</b>	Forest Conservation and Management Act
<b>FRC</b>	Financial Reporting Centre
<b>FRL</b>	Forest Reference Level
<b>FMA</b>	Forest Management Agreement
<b>GHGs</b>	Greenhouse Gases
<b>IPCC</b>	Inter-governmental Panel on Climate Change
<b>JMA</b>	Joint Management Agreement
<b>KEFRI</b>	Kenya Forestry Research Institute
<b>KFS</b>	Kenya Forest Service
<b>KWS</b>	Kenya Wildlife Service
<b>LULUCF</b>	Land-Use, Land-Use Change, and Forestry
<b>MOECCF</b>	Ministry of Environment, Climate Change and Forestry
<b>NDC</b>	Nationally Determined Contribution
<b>NEMA</b>	National Environment Management Authority
<b>NFMS</b>	National Forest Monitoring Systems
<b>NGO</b>	Non-Governmental Organization
<b>NIFC</b>	National International Financial Center

<b>NLC</b>	National Land Commission
<b>PES</b>	Payment for Ecosystem Services
<b>PFMP</b>	Participatory Forest Management Plan
<b>REDD+</b>	Reducing Emissions from Deforestation and Forest Degradation in Developing Countries plus the Sustainable Management of Forests and Conservation and Enhancement of Forest Carbon Stocks
<b>REREC</b>	Rural Electrification and Renewable Energy Corporation
<b>SIS</b>	Safeguards Information System
<b>TEHG</b>	The German Emissions Trading Act
<b>UNFCCC</b>	United Nations Framework Convention on Climate Change
<b>VCM</b>	Voluntary Carbon Markets
<b>VCS</b>	Verified Carbon Standard

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## Executive Summary

Reducing emissions from deforestation and forest degradation in developing countries plus the sustainable management of forests, and the conservation and enhancement of forest carbon stocks (REDD+) is one of the most pivotal programmes for financing climate action in developing countries. Established under the auspices of the UNFCCC and more deeply entrenched through inclusion in the Paris Agreement, the REDD+ framework ensures that the important role of forests in the mitigation of climate change is emphasized, and countries benefit from keeping their forests intact.

However, to obtain the financing necessary to protect the world's most vulnerable forests, REDD+ countries need to offer clear and uncontested claim and title to the emanating emissions reductions otherwise referred to as 'carbon rights'. This report details the findings of a legal analysis carried out on the framework for carbon rights in Kenya, in the context of REDD+. The study was carried out by Cliffe Dekker Hofmeyr (Kieti Law) under the Project, accelerating REDD+ in Kenya for equitable climate mitigation and benefits (ClimateARK), funded by the UK Partnering for Accelerated Climate Transitions (UK PACT) programme.

ClimateARK is a collaboration of Conservation International in partnership with Kieti Law, Kenya Wildlife Conservancies Association and Indigenous Livelihood Enhancement Partners, to scale-up and buttress ongoing REDD+ implementation efforts, especially REDD+ Nesting in Kenya. The project focuses on ensuring a transformative, equitable and inclusive multi-stakeholder approach to nature-based solutions to emission reductions, as identified in Kenya's REDD+ Strategy. This report sets out an analysis of the legal framework for carbon rights in Kenya and highlights the law as at 1st September 2023. It clarifies the policy, legal and regulatory elements touching on carbon rights in the context of REDD+ in Kenya and the experiences of other jurisdictions offering lessons for Kenya.

A central finding of the study is that Kenya currently lacks an overarching legislation dealing specifically with carbon rights and setting out with certainty the legal nature of carbon credits and their treatment under law despite the recent efforts to enact the Climate Change (Amendment) Act 2023. However, ongoing REDD+ projects in the country demonstrate that the existing policy and legal framework is supportive of the creation of these rights and has so far enabled the transfer of carbon credits. This is despite the lack of explicit overarching legal provisions and guidance on carbon rights in the country. Whilst the existing framework is supportive, it needs to be strengthened to ensure it meets the critical requirements for clarity on carbon rights, to facilitate greater access to forest carbon finance, both results-based payments and carbon market financing, as uncertainty is a disincentive to investment.

The need to focus on carbon rights is emphasized by the National REDD+ Strategy which calls for clarification of definitions of carbon rights to streamline benefit sharing mechanism for all stakeholders. As Kenya designs its approach for nesting forest carbon projects into a jurisdictional REDD+ programme, as well as sets out to enhance integrity in its VCM approach, engage more fully with Article 6 markets and overall meet its NDC targets, there is need for legal reform to address questions on the ownership of forest carbon and underlying rights to ensure REDD+ activities have high environmental integrity and provide assurance on the inclusion of Indigenous Peoples and Local Communities. Clarity on the conceptualization and treatment of carbon credits is also necessary to stimulate investment.



## Summary of key issues and gaps in Kenya's current legal framework on carbon rights:

- **Forest carbon ownership-** Kenya's legal framework makes no explicit provision on who has the right to own carbon credits/emission reductions or removals. However, the existing land and forest ownership and tenure system hinged on the Constitution of Kenya and laws on the management of land, forests and other natural resources provides guidance on ascertaining the legal owner of the rights to emission reductions or removals in REDD+ projects. The presumption, based on a review of these laws, is that ownership of the rights to forest carbon is tied to the ownership or user rights attaching to land or forests, with the owner of forest carbon therefore possibly being a public, private, community land or forest owner in line with Kenya's regime for land holding and forest ownership. In the absence of explicit provisions on forest carbon ownership and particularly where forest or land ownership is contested, there are high chances of human rights violations where entities engage in the trade and transfer of carbon credits that do not belong to them and those entitled to participate in REDD+ activities and benefit from the sale of emission reductions or removals under results-based payment schemes or carbon market transactions may end up unfairly missing out.
- **Legal nature of carbon credits-** While carbon credits and related terms such as "carbon markets," "carbon projects", "carbon asset", "carbon trading" and "carbon offsets" are found in Kenya's legal and policy texts highlighting a recognition of projects that reduce or remove greenhouse gas emissions enabling the creation of carbon rights which form the bundle of rights that are a subject of carbon transactions, there is no explicit provision conceptualizing the legal nature of carbon credits. In the absence of explicit provision on what a carbon credit is, it becomes difficult to determine the key application of certain legal principles as well as the treatment of carbon credits in the case of taxation, insolvency, and taking and enforcing security, all which may be relevant to certain carbon transaction structures.
- **Transfer of carbon credits –** The transfer of carbon credits is in practice done contractually. However, there is lack of clarity in the legal framework on the specific role of the national government and county government in these transfers. This has seen instances where project proponents are unclear on what consents and approvals are needed, and there are reports of county governments intervening in carbon projects and attempting to cancel carbon contracts they are not party to. The Climate Change Amendment Act, 2023 provides some guidance on the modalities of engagement in the carbon markets. However, regulations are necessary to provide more clarity on the transfer of carbon rights, clearly articulating who is an authorized seller and buyer and ensuring the set-up of the requisite institutional and technological framework for transfers. Without clear legal mandate for the provision of consents and approvals and the requisite processes and procedures in place, projects have inconsistent transfer practices and operate in an uncertain policy environment and government entities are left unclear on their specific roles and responsibilities in REDD+.
- **Tenure rights -** Where there are significant challenges in the underlying land and forest tenure rights, REDD+ projects are affected. Where communities lack proper title to hold forestland or have unrecognized user rights, they may be unable to pass valid title over carbon credits or benefit effectively from a REDD+ programme. As such the different ways that communities can be involved as owners of rights to carbon and/or beneficiaries in REDD+ need to be strengthened and any requisite registration or contracting done to recognize these rights. There is lack of full



adherence with the community tenure rights protections set out in the Community Land Act, 2016 and many communities remain unregistered. Further, the use of Community Forest Associations granting communities' user rights in public forests as per a Participatory Forest Management Plan (PFMP) and Forest Management Agreement (FMA) in line with the Forest Conservation and Management Act, 2016 also faces challenges that limit the full participation of communities.

- **Enhancing safeguards** - Decision-making on carbon rights should apply a human rights-based approach to ensure a human rights lens is applied to all facets of REDD+ activities. This means ensuring that the conceptualization, ownership, and transfer of carbon rights reflect major social safeguards pillars including: free and prior informed consent, public participation, environmental integrity, gender equity and social inclusion, access restrictions, and grievance redress. Whilst there exists a national REDD+ Safeguards Information System, and the Climate Change Amendment Act, 2023 encompasses the safeguards approach, for example by stating that the country will not consider emission credits that have been achieved in violation of human rights and without free prior and informed consent, further guidance is needed to clarify on modalities for ensuring social safeguards are central in REDD+. This is because despite stating that projects are to undergo a REDD+ safeguards standards assessment, the Climate Change Amendment Act 2023 does not define what the REDD+ safeguards standards assessment entails nor is it clear who is to carry out the assessment and how this will be done. There are overlapping existing and proposed laws on benefit sharing such as the Natural Resources (Benefit Sharing) Bill, 2022 and the Climate Change Amendment Act, 2023 which create uncertainty for project development and implementation.

**Based on the above findings, the study makes the following recommendations:**

- Assert the ownership of forest carbon in legislation-** To enable clarity thus facilitating investments in REDD+ and also ensure all stakeholders in REDD+ benefit from the programme, Kenya should have legislation asserting the rightful owner(s) of forest carbon in line with the Constitution, which is the overarching law in the country. This will ensure the rights of Indigenous Peoples and Local Communities are protected at all instances, and they benefit from the carbon and non-carbon benefits of REDD+ activities, whilst private investment in REDD+ is promoted as opposed to disincentivized.
- Clearly conceptualize and define the legal nature of carbon credits** – The absence of a clearly conceptualized and defined position on what is the legal nature of a carbon credit hampers clarity on the correct treatment of carbon credits emanating from forest emission reductions or removals activities. Kenya should therefore determine through legislation whether carbon credits are intangible property rights, a natural resource, a commodity or a financial instrument.
- Clarify and streamline procedures and processes for transfer of carbon credits** – Regulations to operationalize the Climate Change Amendment Act, 2023 are necessary to clarify the transfer process. The law as amended recognizes trade in carbon credits as a result of a bilateral or multi-lateral trading agreement, trading with a private entity or in a voluntary carbon market. There is a Designated National Authority with oversight over carbon projects and the proposed establishment of a carbon registry. The operationalization of these key provisions is necessary, within a framework that sets out a clear approval and authorizations process codified in law to eliminate all ambiguity on which government entity is responsible for what.

- iv. Reform and strengthen Kenya's land and forest tenure** – Due to the fact that carbon rights are linked to land and forest tenure in Kenya, there exists an intricate relationship between the tenure system and ownership of carbon rights. There is therefore a need to reform land tenure frameworks and their implementation to resolve ongoing contested tenure and land right claims, so as to provide clarity on the claims to the underlying carbon rights. This necessitates the implementation of community land laws as envisaged by the Constitution and the Community Land Act as well as solidifying the user rights of communities in gazetted forests. This is ultimately important in ensuring that the rights of Indigenous Peoples and Local Communities, who often have a critical stake in decisions about land and resource governance, are respected and upheld.
- v. Apply a human-rights centric approach to decision-making on carbon rights that balances community rights with promotion of investments in REDD+** – Kenya should enact regulations and guidelines that further enhance the safeguards approach to REDD+ that is set out in the country's policy and legal framework. These include regulations on the carrying out of REDD+ Safeguards assessment. Further, laws and regulations in the country should also aid and not hamper REDD+ investments and the ability of communities to benefit from their carbon rights. To this end, REDD+ should be carved out of the Natural Resources (Benefit Sharing) Bill 2022, whose provision on benefits sharing in the exploitation of forests overlap with benefit sharing provisions already in the Climate Change (Amendment) Act, 2023.



A photograph of a dry lake bed with a small blue boat in the foreground and mountains in the background. The lake bed is composed of brown mud and light-colored pebbles. The boat is small, blue, and appears to be made of wood or metal, with some water inside. In the background, there is a calm body of water reflecting the sky, surrounded by dry, yellowish-brown hills. In the far distance, there are mountains with some snow or light-colored rock. A small group of people is visible on the shore in the middle ground. A red, torn-paper-like shape is overlaid in the top left corner, containing the text "Part 1".

Part 1

# Introduction



Global climate change is having devastating impacts on life on earth, and massive greenhouse gas (GHG) emission reduction and removals are required to keep global temperatures within the Paris Agreement limits.<sup>1</sup> Forests are important as they support the livelihoods of up to 1.6 billion peoples and 80% of all terrestrial biodiversity, whilst playing a crucial role in combating climate change by absorbing massive amounts of carbon dioxide from the air and storing it in above and below ground carbon.<sup>2</sup> The Intergovernmental Panel on Climate Change recognizes the importance of forests, highlighting with high confidence that reducing deforestation and forest degradation lowers GHGs with an estimated technical mitigation potential of 0.4–5.8 GtCO<sub>2</sub> yr<sup>-1</sup>, and sustainable forest management both lowers GHG emissions and contributes to adaptation.<sup>3</sup>

In tandem with the recognition of the significance of forests for climate action, the global community has under the auspices of the UNFCCC agreed on the REDD+ framework to reduce deforestation and forest degradation (REDD), with the + ('plus') denoting that the agreed upon framework also includes components on the role of conservation, sustainable management of forests and enhancement of forest carbon stocks in emission reduction. REDD+ as such presents an international arrangement through which developing countries including the local communities within them can receive results-based climate finance payments based on the measured carbon reductions and removals,<sup>4</sup> with REDD+ activities being implementable at the national, sub-national or project level.

However, there are many hurdles that Local Communities and marginalized groups, especially women and Indigenous People, still face, including a lack of rights around forest use and land tenure, which can prevent them from equitably accessing and receiving such benefits.<sup>5</sup> For the global REDD+ effort to succeed in reducing carbon emissions, it has to deliver REDD+ co-benefits in the form of sustainable development, poverty reduction and gender equality—nothing less will make REDD+ effective, equitable and sustainable, and therefore successful.<sup>6</sup>

The UNFCCC through successive Conference of the Parties (COPs) has established guidance, rules, and modalities to steer the implementation of an equitable and fair REDD+,<sup>7</sup> with the 2015 Paris Agreement buttressing the framework's importance in combating climate change. Article 5 of the Paris Agreement is particularly important for REDD+, as it calls for Parties to take action to conserve and enhance, as appropriate, sinks and reservoirs of GHGs, including forests. Parties are also encouraged to take action to implement and support, including through results-based payments, the existing framework for REDD+ as set out in guidance and decisions agreed under the UNFCCC.<sup>8</sup> Developments under the

<sup>1</sup> See Article 2, Paris Agreement, FCCC/CP/2015/10/Add.1 Decision 1/CP.21. Parties to the Agreement agree to hold the increase in the global average temperature to well below 2°C above pre-industrial levels and pursue efforts to limit the temperature increase to 1.5°C above pre-industrial levels.

<sup>2</sup> IPCC, "Summary for Policymakers", in P.R. Shukla, et al (eds.), *Climate Change and Land: An IPCC Special Report on Climate Change, Desertification, Land Degradation, Sustainable Land Management, Food Security, and Greenhouse Gas Fluxes in Terrestrial Ecosystems* (IPCC, 2019)

<sup>3</sup> *Ibid*, IPCC (2019)

<sup>4</sup> Decisions 9-15/CP.19, UNFCCC. *Warsaw Framework for REDD-Plus*; UNFCCC: Bonn, Germany, 2013.

<sup>5</sup> United Nations Development Programme, 'Gender and Climate Change: Gender and REDD+' (UNDP, 2022).

<sup>6</sup> *Ibid*, (UNDP, 2022).

<sup>7</sup> See for example milestone REDD+ agreements in COP 19 (Warsaw) and COP 16 (Cancun).

<sup>8</sup> Article 5, Paris Agreement, FCCC/CP/2015/10/Add.1 Decision 1/CP.21.

Paris Agreement further require countries to establish how climate mitigation initiatives will address forest tenure and related rights to manage risks and benefits derived from REDD+.<sup>9</sup> As such, the concept of carbon rights must be part and parcel of the REDD+ framework and all related discussions at all levels.

## What are carbon rights?

There is no internationally agreed upon definition of carbon rights and the term has been described as shorthand for a plethora of different tradable GHG rights".<sup>10</sup> These rights are in essence intangible assets created by legislative and contractual arrangements and in the context of REDD+, carbon rights can be interpreted as rights to sequestered carbon contained in the soil, trees, forest, and land, or as rights to benefits arising from REDD+ projects.<sup>11</sup>

The right is usually quantified as a carbon credit, which denotes a certified unit registered under a recognized carbon standard, with one carbon credit equal to one tonne of carbon dioxide equivalent being emissions that have been reduced or removed from the atmosphere by either a project, machine, or other intervention such as REDD+.<sup>12</sup> Generally, carbon rights are either based on the legal control of the emission reduction and removal activity or the legal control of the underlying asset.<sup>13</sup> To establish that one has legal control of emission reduction and or removal activity, they must demonstrate that their actions or assets enable and control GHG emission removal and reduction.

### Emissions reductions (ERs) and carbon rights (CRs)

Carbon rights may refer to the bundle of rights associated with the carbon stored or sequestered by forests which may have tenure implications (the landowner or rights holder owns the carbon), while emissions reductions titles might be linked to the credits derived from Reducing Emissions from Deforestation and forest Degradation, plus the sustainable management of forests, and the conservation and enhancement of forest carbon stocks (REDD+) activities. In the context of jurisdictional REDD+ programmes, ERs and Removals (ERRs) are also the result of REDD+ policies and measures implementation, in line with UNFCCC Conference of the Parties. The term "Title to ERs" has been defined in the Methodological Framework (FCPF), referring to the "full legal and beneficial title and exclusive right to ERs contracted for under the Emission Reductions Payment Agreement (ERPA).

*Source: Francesca Felicani-Robles, Carbon Rights in the Context of Jurisdictional REDD+: Tenure Links and Country-Based Legal Solutions- Information Brief (FAO, 2022)*

As highlighted above there may be interpreted nuanced differences in the terms "carbon rights" and "ER rights". Carbon rights is however sometimes used as an umbrella term encompassing ERs and ERRs, and this report adopts the umbrella use of "carbon rights", to cover the entire scope of rights derived from REDD+ activities.

In practice, the centrality of carbon rights is demonstrated by funding bodies and buyers

<sup>9</sup> Francesca Felicani-Robles, *Carbon Rights in the Context of Jurisdictional REDD+: Tenure Links and Country-Based Legal Solutions- Information Brief* (FAO, 2022).

<sup>10</sup> Charlotte Streck and Moritz Von Unger, *Creating, Regulating and Allocating Rights to Offset and Pollute: Carbon Rights in Practice*, *Carbon & Climate Law Review*, Vol. 10, No. 3, SPECIAL ISSUE ON CARBON RIGHTS (2016), pp. 178-189.

<sup>11</sup> Arjuna D and Martijn W, *Forest Carbon Rights: Lessons learned from Australia and New Zealand*, (*Carbon and Climate Law Review*, 2016) Volume 3 Issue No. 5 Page 202-208.

<sup>12</sup> Streck C., *Shades of REDD+: The right to carbon, the right to land, the rights to decide*, (Ecosystem Marketplace 2020).

<sup>13</sup> Streck C. and Von Unger M., *Creating, Regulating and Allocating Rights to Offset and Pollute: Carbon Rights in Practice*, (*Climate Change Law Review*, 2016) Volume 37 Page 180.

of carbon credits requiring assurance that their making of results-based payments or their provision of carbon finance for purchases made in the voluntary carbon market (VCM) are based on REDD+ activities that offer clear inalienable title to the arising rights. In the VCM, Standard Bodies will for example require that the project proponent(s) demonstrate they have "unconditional, undisputed and unencumbered ability to claim that the project will or did generate or cause the project's climate, community and biodiversity benefits."<sup>14</sup> National and sub-national jurisdictions seeking results-based payments will also have to comply with legal requirements for ERs/carbon rights as set out below:

**Table 1: ER/carbon right requirements relevant to national and sub-national jurisdictions under different REDD+ programmes and standards<sup>15</sup>**

<b>GCF REDD+ Results-Based Payments</b>	In section F of the pilot programme for REDD+ results-based payments, legal title to REDD+ results requires developing countries to: "(i) provide an analysis with respect to legal title for REDD+ results in the country, including an analysis of entitlement to claim for the results to be paid for by the GCF and (ii) to provide a covenant that no other party has a competing claim to the results proposed to the GCF in accordance with national policy, legal or regulatory frameworks."
<b>World Bank Carbon Fund</b>	Submit evidence demonstrating the Programme Entity's ability to transfer title to ERs, free of legally recognized interests, encumbrance or claim of a third party and provide a tentative risk rating that this ability is clear or uncontested. As part of this demonstration, include a discussion on the implications of the land and resource regime on the ability to transfer Title to ERs to the Carbon Fund. (Conditions of effectiveness and sale and purchase – schedule 1). The ability to transfer Title to ERs may be demonstrated through various means, including reference to existing legal and regulatory frameworks, sub arrangements with potential land and resource tenure rights-holders (including those holding legal and customary rights, as identified by the assessments conducted under section 4.4), and benefit sharing arrangements under the Benefit Sharing Plan."
<b>ART-TREES</b>	<p>Provide a summary of the participant's rights to the emissions reductions and removals (ERRs) generated from the accounting area, such as regulatory frameworks, laws or administrative orders, or a description of how rights will be obtained in accordance with domestic law. It may be unnecessary for the participant to establish or enact new legislation or a legal framework to address carbon rights.</p> <p>However, the participant must explain how, under existing constitutional or legal frameworks, carbon rights and related intangible property interests are established and addressed. This explanation should include how such carbon rights and intangible property interests would be established, the legal basis for creating such rights and interests and how claims to such rights from private parties, Indigenous Peoples or sub national entities will be resolved. This should be consistent with applicable UNFCCC Cancun Safeguards and Section 12.0. To address the latter, the participant must describe any agreements in place that will be in place for the transfer of TREES rights or benefit allocation arrangements with landowners or resource rights holders that exist between the participant and project owners, landowners, and other collective rights holders (including Indigenous Peoples and other traditional communities). TREES will only be issued with a demonstration of clear ownership or rights. Participants may provide this demonstration at a later date, within the same crediting period or during a subsequent crediting period, provided the crediting periods are adjacent.</p>

From the onset of REDD+, carbon rights have been recognized as important. There have been assertions that "specific domestic laws on carbon rights in REDD+ are not a pre-requisite for

<sup>14</sup> VCS, Climate, Community & Biodiversity (CCB) Standards: v3.1, 21 June 2017.

<sup>15</sup> Felicani-Robles F., Carbon Rights in the Context of Jurisdictional REDD+: Tenure Links and Country-Based Legal Solutions- Information Brief (FAO, 2022).



defining who holds carbon property or the rights to benefits from carbon trading, as in the absence of specific domestic laws, carbon rights can be interpreted through existing law.”<sup>16</sup> It has on the converse also been recognized that significant gaps or deficiencies in local laws may increase uncertainty as to which entities hold which rights in carbon and this may risk the overall integrity and objectives of the REDD+ scheme.<sup>17</sup>

Issues concerning carbon rights include how the rights are defined, how they work in places where land ownership is unclear, and whether legal institutions are strong enough to protect the rights.<sup>18</sup> Indigenous Peoples and Local Communities on whose lands REDD+ activities are often found, are at particular risk of having their carbon rights captured by states or other legal entities,<sup>19</sup> and where forest and carbon rights are unclear or contested, the question of who benefits from REDD+ becomes entangled with unresolved and contested rights to land and forests, and associated opportunities for development.<sup>20</sup> These carbon rights-related issues need clarification in a country’s policy and legal framework, to ensure that the country is not only able to access financing for Nature Based Solutions (NbS) such as REDD+, but also that finance and any non-monetary benefits are transmitted to and utilized by those who are the rightful beneficiaries of the REDD+ activities.

Additionally, the international climate change regime has been steadily evolving, and the ongoing developments further inform the increased need for regulatory attention to carbon rights in various jurisdictions. These developments include:

**The development and implementation of country Nationally Determined Contributions (NDCs)-** The Paris Agreement signed in 2015 requires each Party to prepare, communicate and maintain successive NDCs that it intends to achieve,<sup>21</sup> to meet the global mitigation target. Among priority areas for NDC action, many countries refer to REDD+<sup>22</sup> and importantly, countries are keen to ensure they meet their set out NDC targets with action hinged on their priority action areas. Governments are showing interest in tracking, incentivizing, and managing to varying extents the carbon market activities related to emission reductions or removals, recognizing that these have a bearing on their NDC target.<sup>23</sup>

Tracking and managing carbon market activities enables countries hosting carbon project activities to keep an inventory of carbon credits produced and traded thus ensuring that all carbon trading is aligned with the achievement of their NDC targets.<sup>24</sup> A clear panorama of a country’s national carbon stock is crucial for regulating other players’ participation in the

<sup>16</sup> Kennett, S. A, and A. J Kwasniak, 2005. “Property Rights and the Legal Framework for Carbon Sequestration on Agricultural Land,” *Ottawa L. Rev.* 37: 171, as quoted in Leo Peskett and Gernot Brodnig, *Carbon Rights in REDD+: Exploring the Implications for Poor and Vulnerable People*, (World Bank and REDD-net, 2011).

<sup>17</sup> *Ibid*, (Kennett, 2005).

<sup>18</sup> USAID, *Forest Carbon, Markets and Communities (FCMC) Program: Finance and Carbon Markets Lexicon* (USAID, 2012).

<sup>19</sup> Rights and Resources Initiative & McGill University, *Status of Legal Recognition of Indigenous Peoples’, Local Communities’ and Afro-descendant Peoples’ Rights to Carbon Stored in Tropical Lands and Forests*, Policy Brief, June 2021.

<sup>20</sup> Streck C. (2020). Who Owns REDD+? Carbon Markets, Carbon Rights and Entitlements to REDD+ Finance. *Forests*, 11, 9, 959.

<sup>21</sup> Article 4, paragraph 2, Paris Agreement 2.

<sup>22</sup> UN REDD, *Linking REDD+, the Paris Agreement, Nationally Determined Contributions and the Sustainable Development Goals: Realizing the Potential of Forests for NDC Enhancement and Implementation*, (UN REDD, 2022).

<sup>23</sup> EY and Gold Standard, *Carbon Credit Rights under the Paris Agreement: How Article 6 and the Implementation of NDCs May Shape Government Approaches to the Carbon Market, and What this Mean for Rights Related to Carbon Credits*, (EY and Gold Standard, 2022).

<sup>24</sup> Favasuli S, ‘Carbon Credits Conundrum: What’s left for countries hosting carbon projects as VCMs develop’, S and P Global Commodity Insights 20th July 2022.

carbon markets and preventing overselling.<sup>25</sup> Overselling of carbon credits is a big risk for host countries as it not only acts contrary to the respective country's achievement of its NDC, but it also means that the country may have to buy credits from elsewhere at a great deal of public expense. Countries therefore need to deliberate on the extent to which their carbonmarket activities including their REDD+ engagement utilizes market mechanisms in a way that ensures they meet their NDC and all other global commitments.

**Article 6 of the Paris Agreement-** The Paris Agreement allows countries to voluntarily co-operate with each other to achieve emission reduction targets set out in their NDCs through co-operative approaches set out in Article 6 of the Agreement. These include a country- to-country transfer of authorized mitigation outcomes,<sup>26</sup> or trading between countries under the oversight of a Supervisory Body established by the COP.<sup>27</sup> International co-operation under Article 6 of the Paris Agreement is necessary to help accelerate investments in mitigation and raise overall ambition, and with there being agreement on the Article 6 Rulebook at the international level, countries are required to cascade this understanding and guidance on how Article 6 works to develop relevant national legal, policy and institutional architecture.<sup>28</sup> Within this developing national framework, an opportunity is created to open the discourse on carbon rights nationally and provide greater clarity on these rights in the context of REDD+ as well as in relation to all other carbon projects that would be subject to Article 6.

**Integrity in the VCM-** VCMs have the potential to mobilize significant private sector climate finance in developing countries generally, and more specifically offer opportunities for growing NbS in tropical forest countries.<sup>29</sup> For example, it is estimated that demand for carbon credits could rise to USD 50 billion by 2030.<sup>30</sup> Despite this growth, the integrity of the VCM has been questioned, with concerns predominantly on environmental integrity risks as reflected in carbon accounting issues. In recent years, however, a number of market initiatives have emerged from both the private and public sectors seeking to improve the integrity and functionality of voluntary carbon markets.<sup>31</sup> The Voluntary Carbon Markets Integrity (VCMI) Initiative launched its claims code of practice that includes a four-step process for corporate organizations to make credible claims about their use of voluntary carbon assets.<sup>32</sup> To make a VCMI claim companies must amongst other requirements maintain and publicly disclose an annual greenhouse gas emissions inventory; select a VCMI claim out of the three provided tiers (gold, silver and platinum); meet the required carbon credit use quality threshold; and obtain third-party assurance of reported information.<sup>33</sup>

The Integrity Council for the Voluntary Carbon Market has published the Core Carbon Principles which aim to provide a readily identifiable, market-wide benchmark for carbon credit quality and integrity across an otherwise fragmented and multi-faceted market.<sup>34</sup> The Core Carbon Principles provide a criteria against which carbon projects must meet in

<sup>25</sup> *Ibid*, (Favasuli, 2022).

<sup>26</sup> Article 6.2, Paris Agreement.

<sup>27</sup> *Ibid*, Article 6.4.

<sup>28</sup> "World Bank, *Country Processes and Institutional Arrangements for Article 6 Transactions*. Article 6 Approach Paper Series; No. 2, (World Bank, 2021).

<sup>29</sup> Voluntary Carbon Markets Integrity Initiative (VCMI), *VCMI Proposal to Assist Developing Countries to Develop VCM Access Strategies*, Working Paper (VCMI, 2021).

<sup>30</sup> Charlotte Streck et al, *The Voluntary Carbon Market Explained*. (VCM Primer), (Climate Focus, 2021).

<sup>31</sup> Allegra D, *Voluntary Carbon Markets: A Review of Global Initiatives and Evolving Models*, Center for Strategic International Studies, 31st May 2023.

<sup>32</sup> Voluntary Carbon Markets Integrity Initiative, *Claims Code of Practice: Building Integrity in voluntary carbon markets*, (VCMI, 2023).

<sup>33</sup> *Ibid*, (Voluntary Carbon Markets Integrity Initiative, 2023).

<sup>34</sup> Kiwelu L, *A boost to Integrity in the Voluntary Carbon Market*, Norton Rose Fulbright, April 2023.

order for their carbon credits to get approval for a CCP label of high quality.<sup>35</sup> The criteria is based on ten core standards amongst them effective governance; compliance with social and environmental safeguards; independent third-party validation and verification; and operating or using a registry to uniquely identify, record and track mitigation activities and carbon credits issued to ensure credits can be identified securely and unambiguously.

Clarity on the nature of carbon rights allows for broader aspects of what encompasses high integrity to be considered, such as safeguards requirements and contested issues such as tenure reform and benefit sharing.<sup>36</sup> This is important for the environment but also makes economic sense as price differentiation is likely for high-integrity credits.<sup>37</sup> Host countries are therefore working to promoting supply-side integrity and governments can leverage VCM finance by engaging in the VCM as program regulators, in which role they can clarify at the country-level carbon rights and corporate claims with respect to the use of carbon credits.<sup>38</sup>

**REDD+ Nesting-** REDD+ activities are implementable at the national, sub-national and local level. In many countries, local level projects/site have moved ahead of international processes, and there is now a drive to integrate existing forest carbon projects operating at the local level into larger-scale REDD+ programs at the national level, while allowing them to continue generating and trading carbon units.<sup>39</sup> Many of the local level projects were developed independently of national policy and systems, with reporting and accounting rules, environmental and social safeguards and use of registries inconsistent with emerging national system, and carbon rights typically moving offshore.<sup>40</sup> However, as nesting becomes more central to the REDD+ operations in a country, national policy and systems need to consider carbon rights more concretely.

When designing a nested system, a country needs to identify and resolve issues related to carbon credit accounting, carbon standards and methodologies, carbon market approaches as well as institutional and legal arrangements. From a benchmarking study of REDD+ nesting approaches in various countries, clear rights to carbon underpinning REDD+ projects are important, particularly for securing investment in projects at scale as well as ensuring alignment, consistency, and integrity of emission reduction claims during carbon market engagements.<sup>41</sup> Without a clear framework for determining the nature and ownership of carbon rights, it can be difficult to determine who has the authority to manage, use and benefit from carbon credits. Such lack of clarity leads to uncertainty, confusion, mistrust, and disputes amongst the parties involved, which ultimately leads to difficulty in implementing a nested framework within the country.

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<sup>35</sup> *Ibid*, (Kiwelu, 2023).

<sup>36</sup> Ana Karla Perea, *High-Integrity Voluntary Carbon Markets (VCM): Emerging Issues in Forest Countries*, (UNDP, 2021).

<sup>37</sup> *Ibid*, (UNDP, 2021).

<sup>38</sup> Charlotte Streck et al, *The Voluntary Carbon Market Explained*. (VCM Primer), (Climate Focus, 2021).

<sup>39</sup> Lee, Donna et al., *Approaches to REDD+ Nesting; Approaches to REDD+ Nesting: Lessons Learned from Country Experiences*, (World Bank, 2018). Global initiatives to promote high integrity include the Voluntary Carbon Markets Integrity Initiative (VCMI) and Integrity Council for the Voluntary Carbon Market.

<sup>40</sup> *Ibid*, (World Bank 2018).

<sup>41</sup> Pollination and Conservation International, *Lessons Learned from REDD+ Nesting Approaches and Recommendations to Kenya*, (Pollination and Conservation International, 2021).



Figure 1: Developments in the international climate change regime influencing more national focus on carbon rights





# Carbon rights in the context of REDD+ in Kenya



## 2.1 REDD+ in Kenya

Kenya's GHG emissions from land-use, land-use change, and forestry (LULUCF) have contributed to over one third of the country's total emissions over the last 20 years on average, and the country has lost over 536,000 hectares of forest through deforestation, taking its forest cover from 12 per cent in 1963 to about 5.9 per cent in 2018.<sup>42</sup> The major deforestation and forest degradation causes include population pressure for settlements, infrastructure, demand for wood products, conversion of forest land to agriculture, unsustainable utilization of forest products (including charcoal), forest fires and shifting cultivation.<sup>43</sup>

In recognition of this challenge, the government has put in place a variety of efforts to reduce its emissions and conserve and sustainably manage forest resources to benefit from the critical ecosystem services these resources provide. Ongoing conservation projects and initiatives have yielded fruit to some degree as Kenya has met its constitutional target of attaining 10 per cent tree cover, as indicated by the National Forest Resources Assessment Report 2021 which highlights that Kenya's tree cover stands at 12.13 per cent while forest cover is at 8.83 per cent up from 5.9 per cent in 2018.<sup>44</sup> REDD+ projects developed under the various Verified Carbon Standard (VCS) methodologies have been a key component of the increasing forest cover in Kenya and going forwards, these projects developed at both the national, sub-national and local level stand to further support the country's mitigation goals while providing local forest communities with significant co-benefits.

**Table 2: REDD+ projects in Kenya**

Project Name	Project Proponent	Location	Land Tenure	Size Hectare	Carbon Credits	Crediting Period	Project Type	Project Approach	Status
Kasigau Corridor REDD Project	Wildlife Works Carbon LLC	Taita-Taveta	Private land (private and group ranches) and community land	30,169	150,859	2005 - 2034	VCS, CCB	Afforestation Reforestation Avoided Deforestation	Ongoing
Mikoko Pamoja REDD+ Project	Mikoko Pamoja Community Organization Association of Coastal Eco-System	Kwale	Gazetted forests	117	2500	2013 - 2023	Plan Vivo	Afforestation Reforestation Avoided Deforestation	Ongoing
The Chyulu Hills REDD+ Project (CHRP)	Chyulu Hills Conservation Trust Kenya Forest Service, Kenya Wildlife Service David Sheldrick Trust	Makueni Taita Taveta Kajiado	Private land (private and group ranches) and community land	410, 553	1,100,943	2013 - 2043	VCS, CCB	Afforestation Reforestation Avoided Deforestation	Ongoing

<sup>42</sup> Government of Kenya (GoK), *National Forest Resources Assessment Report 2021*, (GoK, 2021).

<sup>43</sup> *Ibid*, (Government of Kenya, 2021).

<sup>44</sup> *Ibid*, (Government of Kenya, 2021).



Project Name	Project Proponent	Location	Land Tenure	Size Hectare	Carbon Credits	Crediting Period	Project Type	Project Approach	Status
Vanga Blue Carbon	The Association for Coastal Eco-System	Kwale	Private land (Private and group ranches)	460	2637	2019 - 2029	VCS	Afforestation Reforestation Avoided Deforestation	Ongoing

Source: CIFOR<sup>45</sup>, REDD+ Impact<sup>46</sup>

REDD+ in Kenya is enabled by a policy and legal framework which recognizes reducing deforestation and forest degradation, conserving, and sustainably managing forests, and enhancing forest carbon stocks as a legal and policy imperative. This is laid out in the Constitution as well as an assortment of provisions in laws and policies on environmental conservation, land management, forest conservation, climate change and climate finance. The emphasis on REDD+ is also grounded on the UNFCCC which Kenya signed on June 12th, 1992, and ratified on August 30th, 1994, and the more recent Paris Agreement signed on 22nd of April 2016 and ratified on 28th December 2016. These Conventions form part of Kenya's laws as any treaty or convention ratified by Kenya forms part of the laws of Kenya.<sup>47</sup>

Pursuant to its international obligations,<sup>48</sup> Kenya submitted its REDD+ Readiness Preparation Proposal in 2010,<sup>49</sup> and thereafter engaged in REDD+ Readiness activities, culminating in the development of a National REDD+ Strategy in 2021.<sup>50</sup> The Strategy is accompanied by delivery of Kenya's Country Approach to REDD+ Safeguards and Safeguards Information System,<sup>51</sup> and a National Forest Monitoring System and the National Forest Reference Level (FRL) for REDD+ Implementation Earlier (currently undergoing revisions).<sup>52</sup>

Inclusivity has been a central pillar of REDD+, with the participation of Indigenous Peoples and Local Communities being highly regarded. Gender integration has also been pivotal in the design and implementation of Kenyan REDD+ policies, programs, and projects. This inclusion has been aimed towards the achievement of the requirements laid out by the international REDD+ framework which emphasizes on gender balance and increased participation of women in national processes. The Cancun Agreement has explicitly included references to gender/women showing increasing commitment and call to countries to promote gender equality in their climate change related policies and initiative. It is against this backdrop that Kenya has made attempts to ensure that these groups are included in ongoing REDD+ activities in the country, including through relevant studies to determine entry-points for action, such as a gender inclusion assessment, providing a country level analysis of gender in the forestry sector to identify opportunities for strengthening gender aspects in REDD+. <sup>53</sup>

## 2.2 Carbon rights in the context of REDD+ in Kenya

Whereas REDD+ projects have been ongoing in Kenya for over a decade, these projects have been enabled by a general legal and policy environment that encourages environmental

<sup>45</sup> CIFOR, *International Database on REDD+ Projects and Programmes*, (CIFOR, 2022).

<sup>46</sup> REDD+ Impact, *REDD+ Projects around the World*, (REDD+ Impact 2020).

<sup>47</sup> Article 2 (6), Constitution of Kenya, 2010.

<sup>48</sup> Decision 1 of COP 16 Para 71 of the Cancun Agreements.

<sup>49</sup> Government of Kenya (GoK), *Revised REDD Readiness Preparation Proposal Kenya*. Submitted to the Forest Carbon Partnership Facility, (GoK, 2010).

<sup>50</sup> Government of Kenya, (G.O.K), *Kenya's National REDD+ Strategy*, Ministry of Environment and Forestry (MoEF, 2021).

<sup>51</sup> Government of Kenya, *A National Approach to Safeguards and a Safeguards Information System for REDD+ Implementation* (GoK, 2021).

<sup>52</sup> Government of Kenya, *The National Forest Reference Level for REDD+ Implementation* (GoK, 2020).

<sup>53</sup> Government of Kenya, *REDD+ Gender Action Plan*, (G.o.K, 2021); Government of Kenya, Kenya's UNFCCC Submission on Gender, and Climate Change, (G.o.K, 2022).

management, forest conservation and climate mitigation, without any explicit guidance on carbon rights. Kenya is now looking towards moving into broader REDD+ implementation and in this phase, carbon right concerns can no longer be left to the periphery. Significantly, the National REDD+ Strategy recognizes this, highlighting as follows with regards to carbon rights in its strategic options:

- **Strategic Option 1 (scaling up afforestation, reforestation, and landscape restoration programmes)** - Provides that there is need for investing in Payment for Ecosystem Services (PES) systems, with the Ministry of Environment, Climate Change and Forestry (MoECCF) obliged to "clarify definitions of carbon rights and tenure rights to streamline benefits-sharing mechanism for all stakeholders".
- **Strategic Option 2 (enhancing governance and policy implementation to prevent conversion of forests to other land uses)** - Provides that one of its key investment areas is reviewing and harmonizing laws and institutions, and a key investment activity to this end is the "development of land concession protocols that recognizes tree tenure and carbon rights". This responsibility is placed on the Ministry of Lands, MoECCF, Kenya Forestry Research Institute (KEFRI) and Kenya Forest Service (KFS).

The need for clarity on carbon rights is further informed by the developments in the international climate regime that increasingly require carbon rights to be clearly defined and applied to carbon market operations in a country. Table 3 below highlights how this global imperative for carbon rights is applicable in the case of Kenya's REDD+ programme.

**Table 3: Developments in the international climate regime as they relate to carbon rights in Kenya.**

<b>Kenya's Updated NDC</b>	Kenya's Updated NDC aims to make a 32% reduction in emissions by 2030, relative to a business-as-usual scenario of emitting 143 MtCO <sub>2</sub> e annually. The NDC recognizes REDD+ as key in achieving the NDC targets from the LULUCF sector. It highlights that the forest sector has a mitigation potential of 40.2 million tonnes CO <sub>2</sub> by 2030 of which 20.8 million tonnes CO <sub>2</sub> is committed in the NDC and this will require result-based payments as well as a market-based approach that is clear on carbon rights. <sup>54</sup>
<b>Engagement in Article 6</b>	Kenya's Updated NDC highlights an intention to use voluntary cooperation under Article 6 of the Paris Agreement with the guidance adopted by the CMA, and also develop domestic legislation and institutional frameworks to govern engagement in market and non-market mechanisms. This Article 6 legislative and institutional framework will have a bearing on carbon rights treatment for the different projects that will be eligible for Article 6 cooperative approaches. The National Policy on Climate Finance, 2018 notes not to oversell in these markets so as to ensure Kenya meets its NDC target, necessitating State oversight in the market activities of carbon rights holders. <sup>55</sup>
<b>Integrity in the VCM</b>	Kenya is keen on participating in the VCM and is among the countries signed to the Africa Carbon Markets Initiative (ACMI) launched at COP27 with the aim of dramatically scaling VCMs across Africa. The country's National Policy on Climate Finance, 2018 also sets out an aim to "promote investor confidence and participation in market-based mechanisms, focusing on the VCM over the short term, while preparing for the mechanisms created under the Paris Agreement". This highlights that VCMs are a crucial component of the country's market approach and VCM integrity is key to its success. Kenya has in place its National Approach to Safeguards and is also developing its VCM Access Strategies with the support of the VCMI. <sup>56</sup>

<sup>54</sup> Government of Kenya, Updated Nationally Determined Contributions, (G.o.K, 2020).

<sup>55</sup> Government of Kenya, Updated Nationally Determined Contributions, (G.o.K, 2020)

<sup>56</sup> Government of Kenya, National Policy on Climate Finance (G.o.K, 2018).

**REDD+ Nesting**

The National REDD+ Strategy, 2021 recognizes the need for a nesting framework for REDD+ in Kenya. As such Kenya is working to 'nest' site-scale REDD+ projects within its national REDD+ institutional arrangement, so as to catalyze local actions that can contribute to the national emission reduction targets and ensure that the benefits of both site-scale REDD+ projects and national and/or subnational REDD+ programs endure and are consistent with globally agreed principles and provisions. Adoption of a nesting framework for Kenya's REDD+ programme has been necessitated due to understanding of the great variation in forests of Kenya including the variety of stakeholders makes sites scale implementation of projects preferable, because it easily specifies responsibilities and benefits sharing mechanisms at the local scale. This recognition of multiple stakeholders implicitly recognizes the existing different carbon right holders.<sup>57</sup>

From the above, the rationale for a more robust approach to carbon rights is clear. The study now moves to provide an analysis of the opportunities and gaps in Kenya's legal framework as relates to:

- Forest carbon ownership
- The legal nature of carbon credits
- The transfer of carbon credits
- Safeguards in the context of carbon rights

Key lessons from other jurisdictions that have dealt with or are in the process of clarifying these key issues are also highlighted as case studies in the analysis.

### 2.2.1 Forest carbon ownership

As is the case in most of Africa, ownership of rights to carbon in Kenya is not specifically provided for in the existing legal framework.<sup>58</sup> Generally, however, unless the legal framework states otherwise, ownership of rights to forest carbon is taken to be linked and intertwined with land rights.<sup>59</sup> This right may be held by the landowner, or it may be separated from land by the landholder and transferred to a third party.

Kenya's land ownership system has evolved significantly following the promulgation of the Constitution for Kenya in 2010. From a fragmented, inequitable regime, attempts for reform in the recent past have focused on consolidating and simplifying the landholding, use and management regime. Land is constitutionally classified into three clear categories: public land, private land, and community land, with provision made for how each of these land types is vested, owned and managed.<sup>60</sup>

The interest in these different categories of land are held on the basis of recognized land tenure, that is set out in the Land Act as either (i) freehold, (ii) leasehold, (iii) such forms of partial interest as may be defined under the Land Act and any other law, including but not limited to easements, and (iv) customary land rights, where consistent with the Constitution.<sup>61</sup> There is equal recognition and enforcement of land rights arising under all tenure systems,

<sup>57</sup> Government of Kenya, National REDD+ Strategy (G.o.K, 2021)

<sup>58</sup> UN-REDD Programme, *Carbon Rights and Benefit-Sharing for REDD+ in Kenya*. Ministry of Environment, Water and Natural Resources (GoK, 2013).

<sup>59</sup> Loft L, Ravikumar A, Gebara MF, Pham TT, Resosudarmo IAP, Assembe S, Tovar JG, Mwangi E, Andersson K. "Taking Stock of Carbon Rights in REDD+ Candidate Countries: Concept Meets Reality." *Forests*. 2015; 6(4):1031-1060.

<sup>60</sup> Section 30, Forest Conservation and Management Act, 2016.

<sup>61</sup> Section 5 (1), Land Act, No. 6 of 2012.

and non-discrimination in ownership of, and access to land under all tenure systems is emphasized.<sup>62</sup>

### a) Public Land

Public land constitutes a very broad category of resources that are vested in and held by either the National Government or a County Government, and it is administered on their behalf by the National Land Commission.<sup>63</sup> According to the Constitution, County Governments are vested with (i) unalienated government land, (ii) land that is lawfully held by any State organ (other than land held by the State organ as lessee under a private lease or land held by a national state organ), (iii) land transferred to the State by way of sale, reversion or surrender, (iv) land in respect of which no individual or community ownership can be established by any legal process, and (v) land in respect of which no heir can be identified by any legal process. This is vested in the host County Government in trust for the residents of the county.<sup>64</sup> The National Government on the other hand is vested with, among others, all government forests (excluding land lawfully held, managed or used by specific communities as community forests, grazing areas or shrines) and game reserves.

In addition to the National Land Commission (NLC), other State entities may also be involved in management of public land. For example, the responsibility to manage public land such as government forests is placed on the Kenya Forest Service (KFS), established under the Forest Conservation and Management Act.<sup>65</sup> KFS may involve any person, institution, or organization in the management of a public forest by entering into joint management agreements,<sup>66</sup> concessions agreements<sup>67</sup> or community forest management agreements,<sup>68</sup> with different scope of terms, rights and obligations as agreed with the Service. Such management agreements only confer the privilege of managing and controlling the forest as specified in the agreements, but do not confer any right of ownership of the land.<sup>69</sup>

### b) Community Land

Community land includes land lawfully registered in the name of group representatives under the provisions of any law; land lawfully transferred to a specific community by any process of law; any other land declared to be community land by an Act of Parliament; and land that is lawfully held, managed or used by specific communities as community forests, grazing areas or shrines; ancestral lands and lands traditionally occupied by hunter-gatherer communities or lawfully held as trust land by a County Government.<sup>70</sup>

Community land vests in and is held by communities identified on the basis of ethnicity, culture or similar community of interest.<sup>71</sup> The Community Land Act, 2016 and regulations thereunder, provide for the recognition, protection and registration of community land rights; management and administration of community land; and provide for the role of

<sup>62</sup> Section 5 (2), Land Act, No. 6 of 2012.

<sup>63</sup> Article 62, The Constitution of Kenya, 2010.

<sup>64</sup> *Ibid*, Article 62.

<sup>65</sup> Section 8(a), The Forest Conservation and Management Act, 2016.

<sup>66</sup> *Ibid*, Section 8 (a).

<sup>67</sup> Section 2, The Forest Conservation and Management Act, 2016, as read with the Forests (Participation in Sustainable Forest Management) Rules, 2009.

<sup>68</sup> The Forest Conservation and Management Act, 2016 Section 48 and 49 as read with Rule 27, the Forests (Participation in Sustainable Forest Management) Rules, 2009 Rule 43(1).

<sup>69</sup> Section 45(3), The Forest Conservation and Management Act, 2016.

<sup>70</sup> Article 63 (2), The Constitution of Kenya, 2010.

<sup>71</sup> Article 63 (1), The Constitution of Kenya, 2010.

county governments in relation to unregistered community land.<sup>72</sup>

Unregistered community land is held in trust by the County Government on behalf of the community.<sup>73</sup> The County Government is prohibited from selling, disposing, transferring or converting the land for any private purpose.<sup>74</sup> Although the full scope of trusteeship by the County Government in relation to management of unregistered community land is not expressly provided for in the Act, it is presumable from the land use and management principles outlined in the Constitution<sup>75</sup> and the Community Land Act,<sup>76</sup> that County Governments have an obligation to undertake conservation and management of unregistered community land. The community must benefit from any REDD+ projects on such land.

Registered community land on its part, vests in the registered community.<sup>77</sup> Registration confers absolute ownership rights and privileges to the registered community as the proprietor,<sup>78</sup> with the right and responsibility to carry out conservation and management of vegetation on the land. The community may freely use, manage and otherwise dispose of community land, provided this is done in accordance with the provisions of the Community Land Act, and the regulations thereunder, which are important for determining how a community may enter into any REDD+ agreements and arrangements.

### c) Private Land

Private land is any land registered and held by any person under any freehold tenure; land held by any person under leasehold tenure; and any other land declared private land under an Act of Parliament.<sup>79</sup>

The title to private land grants the holder absolute ownership of that land together with rights and privileges attached thereto.<sup>80</sup> These rights and responsibilities include the conservation and management of any vegetation on the land. Where the land owned is subject to a lease, the registered proprietor of that land bears the leasehold interest of the lease together with all the expressed and implied rights, privileges, liabilities, and agreements contained in the lease.<sup>81</sup>

- The Land Act, 2012 provides guidance on the administration and the management of private land as far as contracts over land, leases, charges, and transfers in land are concerned. The Act allows a proprietor of land to transfer land, lease or charge to any person with or without consideration, provided that such a transaction is undertaken through the instrument prescribed in the Act.<sup>82</sup>

Whereas Kenya has in place an elaborate land and forest tenure framework, the challenge

<sup>72</sup> See the Community Land Act, 2016 and the Community Land Regulations, 2017.

<sup>73</sup> The Community Land Act, 2016, Section 6(1).

<sup>74</sup> *Ibid*, Section 6(8).

<sup>75</sup> Article 60(1), The Constitution of Kenya, provides that land in Kenya is to be used and managed in a manner that is sustainable.

<sup>76</sup> Section 3, The Community Land Act, 2016, provides that any person dealing with community land is to be guided by principles of land use and management set out in Article 60 of the Constitution.

<sup>77</sup> *Ibid*, Section 10.

<sup>78</sup> *Ibid*, Section 16.

<sup>79</sup> Article 64, The Constitution of Kenya, 2010.

<sup>80</sup> Section 24(a), The Land Registration Act, 2012.

<sup>81</sup> *Ibid*, Section 24 (b).

<sup>82</sup> Section 43(2), The Land Registration Act, 2012.



faced in NbS projects including REDD+ is that the legal framework has not been fully implemented as envisioned. For example, there still exist instances of contested title such as between the State and local communities, and Indigenous Peoples,<sup>83</sup> which would lead to lack of certainty on who legally holds carbon rights in REDD+ projects established in such contested territory. Aside from contested tenure, there is also an impediment created by failure of both landholders and land administrators including government officials to follow the letter of the law in managing and administering land. In the case of community land for example, gazettment of all community land boundaries by the Cabinet Secretary in charge of land matters has yet to happen in full, yet this is a requirement to trigger the timeline for community land registration under the Community Land Regulations.<sup>84</sup>

Further, transition is unclear/uncertain in instances where land was previously held under group ranch arrangements and was undergoing subdivision and approvals were received prior to commencement of the Community Land Act, but the process of obtaining individual title deeds was not completed before commencement of the Act.<sup>85</sup> There are also cases of group ranch certificates having been issued after Community Land Act came into force under unclear circumstances, as at this point establishes of group ranches is not allowed under law.<sup>86</sup> These situations fail to provide the requisite certainty for carbon project development and hinders investment.

Forest tenure follows the land holding tenure classification laid out in the Constitution of Kenya comprising public, private and communal tenure. Public forests which are classified to include government forests other than community forests and are under the management of the Kenya Forest Service. Private forests include forests that are owned privately either under leasehold tenure, freehold hold tenure, forests held by institutions, individuals, or corporate bodies for commercial or non-commercial use. Community forests are classified to include forests on land lawfully registered in name of group representatives; forests on land lawfully transferred to a specific community; forests on any other land declared to be community land by an Act of Parliament; forests on land that is lawfully held, managed or used by specific communities as community forests; forests on ancestral lands and lands traditionally occupied by hunter-gatherer communities; and forests lawfully held as trust land by the county governments, but not including any public land held in trust by the county governments under Article 62 (2) of the Constitution.<sup>87</sup>

Communities may organize as a Community Forest Association with user rights in public forests indicated in a Participatory Forest Management Plan (PFMP) and Forest Management Agreement (FMA) in line with the Forest Conservation and Management Act, 2016. While the law allows this, CFAs face diverse challenges that may hinder their operations such as the unpredictable evolution of groups over time, the overdependence on forest resources by even larger numbers than before and persisting conflict of interests.<sup>88</sup> Where the county government holds former trust land forests in trust for the county, communities should benefit from any REDD+ programmes or projects and this will require robust benefit sharing agreements.

<sup>83</sup> Nixon Sifuna, "The Fate of Aboriginal Habitation of Gazetted State Forests in Present Day Kenya: A Case Study of the Agitation by the Ogiek and Sengwer Traditional Communities". 2021, *Advances in Anthropology*, 11, 99-127.

<sup>84</sup> Community Land Regulations, 2017.

<sup>85</sup> Community Land Act, 2016.

<sup>86</sup> Community Land Act, 2016.

<sup>87</sup> Section 30 (3), Forest Conservation and Management Act, 2016.

<sup>88</sup> Koech, C. K., P. O. Ongugo, M. T. E. Mbuvi, and J. O. Maua. "Community Forest Associations in Kenya: challenges and opportunities." Kenya Forestry Research Institute (2009).



### The ownership of rights to forest carbon in Kenya's REDD+ projects

The current legal framework in Kenya does not make specific provision for the ownership of forest carbon. The Climate Change Act, 2016 is silent on REDD+ and does not specifically address carbon rights, and though the Climate Change (Amendment) Act 2023 is more explicit on REDD+, by going one step ahead to define REDD+ as activities in the forest sector that reduces GHG emissions from deforestation and forest degradation, as well as the sustainable management of forests and the conservation and enhancement of forest carbon stocks at national and sub national levels,<sup>89</sup> the amended Act does not go further to determine ownership of emanating carbon rights.

Nonetheless, the Constitution and various other laws on the management of land, forests and other natural resources are useful for determining ownership of carbon in REDD+ projects. The presumption, based on a review of these laws, is that ownership of carbon is tied to the ownership or user rights attaching to land or forests. A landowner under any of the land ownership systems may devolve and grant to others, rights or interest in or emanating from land, and these may include carbon rights. In the case of forest-based carbon, ownership will be based on forest tenure, which in Kenya is mirrored against land ownership. Forests are classified as either public, private or communal,<sup>90</sup> each with a different ownership and management regime. Forest carbon and the underlying rights can in the case of public forests be owned by the National Government or a County Government (holding in trust for the people of Kenya or people resident in the county, respectively); in the case of private forests, by the registered owner of private land; and in the case of communal forests, the community in whom ownership of the land is vested. In either of these cases, the forest-owners are not restricted from transferring arising carbon to other parties, contractually.

### *Ownership of forest carbon and Kenya's Nationally Determined Contribution*

Considering the need to meet its NDC, Kenya will also need to be strategic and measured in its engagement with the carbon markets. A country could for example, try to meet its NDC by asserting the right to all carbon credits emanating in its jurisdiction. However, countries with strong community and private property rights such as Kenya do not easily allow such assertions, and the government's claim to all forest carbon credits could be interpreted by courts as taking property for which governments and the original right holders would need to be duly compensated.<sup>91</sup>

Under Kenya's laws government has a right to compulsorily acquire property, however, the Constitution provides protection for property rights as a fundamental right,<sup>92</sup> and compulsory acquisition is allowed only in limited circumstances.<sup>93</sup> It is defined as the power of the State to deprive or acquire any title or other interest in land for a public purpose, subject to prompt payment of compensation.<sup>94</sup> In the absence of any law or directive from government providing that carbon rights are owned by government ab initio, any confiscation of land and carbon rights flowing thereunder would likely require to follow the law on compulsory acquisition. Kenya will therefore likely have to utilize an approvals and authorizations regime to determine how to meet its NDC target, as opposed to making a blanket assertion of ownership of all forest carbon credits.

Kenya will therefore likely have to utilize an approvals and authorizations regime to determine how to meet its NDC target, as opposed to making a blanket assertion of ownership of all forest carbon credits. Whereas different countries have different forest carbon ownership regimes, it is critical that each country has certainty over the legal ownership of forest

<sup>89</sup> Section 2, Climate Change Act, 2016.

<sup>90</sup> Section 30(1), Forest Conservation and Management Act, Act No. 34 of 2016.

<sup>91</sup> Charlottes Streck, "Who Owns REDD+? Carbon Markets, Carbon Rights and Entitlements to REDD+ Finance", *Forests* 2020, 11, 959.

<sup>92</sup> Article 40 (1) and (2), Constitution of Kenya, 2010.

<sup>93</sup> *Ibid*, Article 40(3).

<sup>94</sup> Section 2, Land Act, No. 6 of 2012.

carbon to eliminate any ambiguity, and this ownership should be constitutionally and legally sound to prevent incidences of human rights violations where entities engage in the trade and transfer of carbon rights that do not belong to them and ensure those entitled to participate in REDD+ and benefit from the sale of emission reduction rights under results-based payment schemes or carbon market transactions do not end up unfairly missing out. It is also important that the ownership regime is clear to ensure that both county and national governments are clear on their mandate and jurisdiction, and do not overstep their limits by attempting to void carbon agreements entered into by communities in their counties, despite not being parties to these agreements or having been legally mandated to have oversight over these agreements.

#### Case study two: Ownership of carbon rights in diverse jurisdictions.<sup>95</sup>

**A. Countries where forest resources are deemed to be the property of the state:** Rights to forest carbon follow the right to the land and are owned by the state, but the right to generate ERRs can be transferred to private entities via concession or license. Examples:

- Democratic Republic of Congo: The 1973 General Property Law (Law No. 73-021) provides for state ownership of all land, subject to rights of use granted under state concessions. However, much of the land is under customary ownership. The government can authorize private projects, in which case it transfers the right to “réductions d’émissions congolaises (Urec)” to private project developers (Art. 3).
- Mozambique: All-natural forest and wildlife resources are the property of the state (Art. 109). However, the Land Law of 1997 establishes that individuals, communities and entities can obtain long-term or perpetual rights to land. REDD+ ERRs are owned by the state (Art. 6.1) and all credits are issued by the government. Private projects can receive a license to generate, and market ERRs.
- Vietnam: All forest land is owned by the state; however, private entities, including households, may be allocated or lease forest land for 50 years. Private entities can develop REDD+ projects, however, projects must be approved by the Prime Minister

**B. Countries with State or diverse forest ownership with weak private land titles:** Rights to forest carbon (e.g., Madagascar) or rights to ecosystem services (e.g., Ecuador) are centralized and managed at the level of the national government. Private projects or transactions involving ERRs are not permitted. Examples:

- Ecuador: Though almost all of Ecuador’s forests are held by privates or communities, about half of these lands have unresolved land tenure issues. Indigenous peoples administer large parts of the forest land. However, all ecosystem services, including the right to engage in carbon transactions, belong to the state.
- Madagascar: All forests except for those on titled land are state property. In 2019, in Madagascar only 7% of the land is titled. While the state is the owner of all forests, co-management between the state and local communities was enabled by the 1996 Gestion Locale Sécurisée Law (Law No. 96-025). The government controls access to ERRs and it is not clear whether the government will authorize private projects.

<sup>95</sup>Charlottes Streck, “Who Owns REDD+? Carbon Markets, Carbon Rights and Entitlements to REDD+ Finance”, *Forests* 2020, 11, 959

- C. Countries with diverse forest ownership with community and private land titles:** Rights to forest carbon are regulated, and special rules apply. Private entities are free to participate in voluntary carbon market projects subject to restrictions. Examples:
- Costa Rica: About half of Costa Rica's forests are privately owned. The national PES system covers about 20% of the national territory and facilitates the linkage of conservation and management of forest resources to socioeconomic development. Landowners hold rights to ERRs as part of their right to benefit from ecosystem services.
  - Guatemala: In Guatemala, ownership of forests is linked to that of the land, except when the land title specifies otherwise. Forests are located on state, municipal, communal and private lands and within protected areas. The Climate Change Law of Guatemala clarifies the right of private individuals and communities to engage in AD projects and market ERRs.
  - Peru: Land laws in Peru are not consistent. The Constitution assigns natural resources to the state. Privately owned categories of forest land include land held by Amazonian indigenous communities, Andean peasant communities, private conservation areas and private agriculture plots. About half of the land in Peru is titled. Peru considers REDD+ and AD as ecosystem services and has provided detailed guidance on how private and community actors can benefit from providing ecosystem services. A special resolution (RP-26-2014) regulates the commercialization of REDD+ in national parks.
- D. Countries with diverse forest ownership with strong community and private titles:** No special regulation. Ownership of carbon pertain to landholders. Private entities are free to participate in voluntary carbon market projects within the limits of the law regarding land use and safeguards. Examples:
- Chile: Chile has a strong forest sector and allows private forest ownership. The country has no dedicated legislation on carbon rights in place but honors the rights of land and forest owners to participate in AD projects.
  - Mexico: Mexico has a sophisticated set of laws to regulate forest protection. Mexico differentiates between the rights to sequestered carbon (removals) and avoided emissions from deforestation (which equal to the avoidance of an illegal activity). Only the former can be transacted by private entities. The extent to which the government can or will participate in REDD+ ERR transactions is still under consideration.

### 2.2.2 The legal nature of carbon credits

There is lack of clarity on how carbon rights are conceptualized under Kenya's laws for both forest and non-forest carbon projects. Whereas the terms "carbon markets",<sup>96</sup> "emission reductions",<sup>97</sup> "carbon credits"<sup>98</sup>, "carbon asset"<sup>99</sup> and "carbon trading"<sup>100</sup> are variously reflected in the country's policy and legal framework, there is no explicit definition of carbon rights emanating from these transactions or carbon rights as they relate to the set-out terms. There is also not explicit definition of emission credits, emission reduction units, GHG emissions profile and REDD+ safeguards assessment despite these terms being core to the definition and understanding carbon rights and carbon projects.

REDD+ falls within the land and forest regime, and whereas the laws here recognize the carbon sequestration function of forests,<sup>101</sup> they do not conceptualize the emanating carbon rights or attempt to define them. Other sectoral laws such as the Energy Act is make specific reference to carbon credit trading in the pursuit to promote renewable energy in the country.

<sup>96</sup> Government of Kenya (GoK), *The National Climate Change Response Strategy (NCCRS)*, (GoK, 2010).

<sup>97</sup> Government of Kenya (GoK), *National Climate Finance Policy*, (GoK, 2018).

<sup>98</sup> Energy Act, 2019.

<sup>99</sup> Government of Kenya (GoK), *National Climate Change Policy*, (GoK, 2016).

<sup>100</sup> Energy Act, 2019.

<sup>101</sup> See for example, the Forest Conservation and Management Act, 2016.

The Act creates various institutions such as the Rural Electrification and Renewable Energy Corporation (REREC) and provides that REREC is mandated to “harness opportunities under the clean development mechanism and other mechanisms including, but not limited to, carbon credit trading to promote the development and exploitation of renewable energy sources.”<sup>102</sup> Carbon rights are however not introduced or defined in this legislation, and as an energy sector law, it does not address REDD+ concerns.

Finance laws, such as the Finance Act 2022 also make provision for carbon trading by introducing a corporate tax incentive for companies operating a carbon or emission trading system, provided these companies are certified by the Nairobi International Financial Centre (NIFC) Authority.<sup>103</sup> The Act does not elaborate on trading or conceptualize the rights to credits tradable in such a scheme.

The Climate Change Act which is Kenya’s overarching law on climate matters, when first enacted in 2016, was silent on REDD+, carbon markets, and carbon rights. However, the pursuit of NbS is impliedly acknowledged, and emanating carbon rights impliedly recognized though their exact nature is not categorically laid out, as the Act sets out a framework for mainstreaming climate change considerations at all levels of government and in all sectors of the economy and encourages a low carbon climate resilient development pathway for the country in line with international obligations.

The Climate Change (Amendment) Act, 2023 amends the Climate Change Act and provides a more elaborate framework for Kenya’s engagement with the carbon markets. The Act defines “carbon market” to mean a mechanism that enables and allows public and private entities to transfer and transact emission reduction units, mitigation outcomes or offsets generated through carbon initiatives, programmes, and projects.<sup>104</sup> The Act also defines a carbon credit as “a credit created when the equivalent of one metric tonne of carbon dioxide is prevented from entering the atmosphere and is equal to one tonne of carbon dioxide or the equivalent amount of a different GHG reduced, sequestered, or avoided.” The Act does not however elaborate on the legal nature of carbon credits or the underlying carbon rights.

### Exploring the legal nature of carbon credits in the context of REDD+ in Kenya

Kenya’s laws do not presently explicitly lay out the legal nature of carbon credits, and there is no jurisprudence conceptualizing the ownership of the emanating rights from the courts of Kenya.

The possibilities under law are that sequestered forest carbon and the rights arising thereunder falls within the constitutional definition of property defined as any vested or contingent right to, or interest in or arising from: (a) land, or permanent fixtures on, or improvements to, land; (b) goods or personal property; (c) intellectual property; or (d) money, choses in action or negotiable instruments.<sup>105</sup> Based on this definition, ERs would fall in the category of contingent rights and a person may be deemed to have a proprietary interest or right in an ER on the basis that they have been derived from an underlying asset such as land. The Constitution further defines natural resources as “physical, non-human factors and components, whether renewable or non-renewable” including forests.<sup>106</sup> Kenya’s commodities regulations also point to an inclusion of forest carbon as a commodity under the Capital Markets Act, which defines a “commodity” to include a right or interest derived from a commodity such as a forest.<sup>107</sup>

<sup>102</sup> Section 44(1)(q), Energy Act 2019.

<sup>103</sup> Finance Act, 2022.

<sup>104</sup> Section 2, Change (Amendment) Bill, 2023.

<sup>105</sup> Article 260, Constitution of Kenya, 2010.

<sup>106</sup> *Ibid*, Article 260.

<sup>107</sup> Capital Markets Act; Capital Markets (Commodity Markets) Regulations 2020.

Whilst there is no internationally agreed conceptualization of carbon credits, and the possible legal treatment of carbon rights varies across jurisdictions, carbon credits may be viewed as intangible property, a bundle of contractual rights, or financial instrument/securities.<sup>108</sup> Certainty over the legal nature of carbon credits is important as it determines the key application of certain legal principles in the case of ownership and transfer, taxation, insolvency, and taking and enforcing security, all which may be relevant to certain carbon transaction structures.<sup>109</sup> In Kenya, for example, the lack of clarity on the legal nature of carbon credits means that issues such as taxation are based on varying interpretation of legal texts in the absence of firm provisions. Whereas the sale of a carbon credit is in effect the sale of an intangible asset, questions as to whether income is to be taxed as a revenue received under income tax law only or whether it can be deemed a capital receipt subject to capital gains tax abound.

#### **Casestudy one: The Legal Nature of Carbon Credits in Australia**

Australia's Carbon Credits (Carbon Farming Initiative) Act 2011 ("CFI Act") creates a legislative framework for the development of offset projects and the creation of Australian Carbon Credit Units (ACCUs), from both land sector activities (including avoided deforestation) as well as energy, transport and industry. The CFI Act defines carbon credits created and issued under the Act (ACCUs) as personal property, and ACCUs are recognized as investment instruments for the purposes of the Personal Property Securities Act 2009 and can be used as collateral for financing arrangements. The CFI Act provides that ACCUs are transmissible by assignment, by will, by devolution and by operation of law.<sup>110</sup> States in Australia have created 'carbon sequestration rights' through legislation as highlighted below:<sup>111</sup>

State/Territory	Description of Carbon Right	Relevant Legislation
Queensland	Carbon Abatement Right Profit a Prendre	Forestry Act 1959 (Qld) Land Title Act 1994 (Qld) Land Act 1994 (Qld)
New South Wales	Forestry Right – Profit a Prendre	Conveyancing Act 1919 (NSW)
Victoria	Carbon Sequestration Right	Climate Change Act 2010 (Vic)
Western Australia	Carbon Right and Associated Carbon Covenant	Carbon Rights Act 2003 (WA)
Tasmania	Carbon Sequestration Right	Forestry Rights Registration Act 1990 (Tas)
South Australia	Carbon Right	Forestry Property Act 2000 (SA)

<sup>108</sup> ISDA, *Legal Implications of Voluntary Carbon Credits*, (ISDA, 2021).

<sup>109</sup> *Ibid*, (ISDA, 2021).

<sup>110</sup> Ben McQuhae and the Hong Kong Green Finance Association (HKGFA), *The Legal Nature of Carbon Credits*, (Ben McQuhae, 2023).

<sup>111</sup> Andrea B., "New Dimensions in Land Tenure: The current status and issues surrounding carbon sequestration in regional Australia", *Australasian Journal of Regional Studies*, Vol. 24, No. 3, 2018.



Rights to emissions abated or sequestered are generally held by a landowner unless that right has been sold or transferred to someone else and registered on the land title under the laws of the relevant State. Importantly, carbon sequestration rights are recognized as separate to ownership of land and so it is possible for one person to own the land and a different person to hold the carbon sequestration right.<sup>112</sup> In order to be declared as a registered project under the CFI Act, a project proponent first applies to the Federal Government Agency (CER) for declaration of its project as an 'eligible offsets project.' The proponent must also meet State eligibility requirements to carry out the project.<sup>113</sup>

Australia considers carbon sequestration rights as capital gains tax (CGT) assets. Subsequently, there are CGT consequences of trading in carbon sequestration rights, which will depend on the facts and the way the trade is carried out. For instance, selling a carbon sequestration right to another entity before the end of a contract triggers a CGT event as the sale will result in a change of ownership.

A carbon sequestration right, as defined in New South Wales legislation, is considered to be inherently connected with a primary producer's land and can be an active asset. Therefore, any capital gain made by a primary producer from the granting of that right may qualify for the small business concessions if the conditions for those concessions are satisfied. Disposing ACCUs as opposed to carbon sequestration rights has the effect of causing the income produced from it not to be treated as a capital gain and is instead assessable under Division 420 of the Income Tax Assessment Act 1997.<sup>114</sup>

### 2.2.3 Transfer of carbon credits

Clarifying not just the ownership but also the transferability of carbon credits is central to the working of REDD+. A clear approvals and authorisations framework is increasingly important for giving governments oversight of the REDD+ activities in their jurisdiction, ensuring integrity of transactions, preventing double claiming and in effect stimulating climate finance flows.

There is no overarching legal or regulatory framework in Kenya setting out the modalities of transfer of carbon credits from sellers to buyer. Owners of carbon credits ordinarily transfer their credits through contractual agreement, requiring observance of the country's contract laws as well as applicable environmental conservation, land and forestry laws relating to investments in these natural resources. A review of the sectoral laws related to forestry point to an assortment of institutions that manage and administer different facets of forest carbon projects, and which would have oversight over the different aspects of these projects.

**Table 4: Kenya's sectoral laws managing forest carbon projects.**

Institution	Approval
<b>Ministry of Environment, Climate Change and Forestry State Department for Forestry</b>	The Ministry of Environment and Forestry houses the Directorate of Forest Conservation, and the office of the National REDD+ Coordinator involved in coordination of all REDD+ activities in the country and linkage of ongoing REDD+ activities with Kenya's National REDD+ program. Some of the functions of the National REDD+ Coordination Office include implementation of REDD+ activities and communicating REDD+ processes as well as undertaking consultation with stakeholders. <sup>115</sup> While Ministry level approval is not currently set out under law as a requirement for carbon projects, given the significant role of the National REDD+ Co-ordinator, REDD+ projects often maintain contact with the office of the Co-ordinator and keep abreast of national REDD+ developments.

<sup>112</sup> Pollination and Conservation International, *Lessons Learned from REDD+ Nesting Approaches and Recommendations to Kenya*, (Pollination and Conservation International, 2021).

<sup>113</sup> Carbon Credits (Carbon Farming Initiative Regulations 2011, Government of Australia).

<sup>114</sup> 'Water and Carbon Sequestration Rights,' 2016. Australian Taxation Office. The Australian Government.

<sup>115</sup> Ministry of Environment, Water and Natural Resources, Legal Report: Forest Governance, REDD+ and Sustainable, 2013.



<b>Ministry of Environment, Climate Change and Forestry</b>  <b>Climate Change Directorate</b>	<p>The Climate Change Directorate is established by the Climate Change Act, 2016 to coordinate all matters concerning climate change in the country.<sup>116</sup> Under the Act, one of the functions of the Directorate is to establish and manage a national registry for appropriate mitigation actions by public and private entities.<sup>117</sup> The role of the Directorate is also expressly set out in the Draft Climate Change (Monitoring, Reporting and Verification) Regulations, 2021, which provide for the monitoring, reporting and verification (MRV) obligations for specific activities that project proponents must undertake.<sup>118</sup> These include mitigation actions listed in the Second Schedule undertaken by either public or private entities. This schedule lists REDD+ activities on a land size of 10 hectares or more, including site-scale REDD+ activities. Under the draft regulations, project proponents are required to submit a mitigation report outlining their mitigation actions annually to the Directorate. In addition, the Directorate in coordination with other relevant agencies, has the responsibility of developing sector-based guidelines that further outline the MRV actions for the scheduled activities.<sup>119</sup></p>
<b>Kenya Forest Service</b>	<p>The Forest Conservation and Management Act, 2016 establishes KFS which is inter alia mandated to conserve and manage public forests.<sup>120</sup> The Service may grant concessions or enter into joint management agreements, whereby a non-owner of forest land is involved in the management of the forest. Undertaking REDD+ activities and transferring any carbon rights emanating from a public forest resource to a third party will require the approval of KFS given its oversight role over public forests.</p>
<b>The National Environmental Management Authority (NEMA)</b>	<p>The Environmental Management and Co-ordination Act, 1999 (EMCA) requires project proponents carrying out any of the listed projects set out in the Second Schedule of EMCA, to undertake a full environmental impact assessment study and submit an environmental impact assessment study report to National Environment Management Authority (NEMA), prior to being issued with an EIA licence by NEMA.<sup>121</sup> NEMA may however direct that the project proponent foregoes the submission of the EIA study report in certain cases.<sup>122</sup> The listed projects in the Second Schedule are classified as low risk, medium risk and high-risk, depending on the impact they are likely to have on the environment. Medium risk projects under the Act include forestry activities such as reforestation and afforestation,<sup>123</sup> The Environmental (Impact Assessment and Audit) Regulations, 2003 provide guidance on environmental assessment requirements for each class of project. An EIA study is required to be undertaken and upon submission of the project report NEMA determines whether the project proponent should proceed with the project or whether they should submit a comprehensive project report, prior to being issued with an EIA license. The Climate Change Amendment Act, 2023 is explicit that carbon trading projects authorized under this Act shall be required to undergo an environmental and social impacts assessment.<sup>124</sup></p>
<b>Kenya Wildlife Service</b>	<p>Government game reserves, national parks, government animal sanctuaries, and specially protected areas are classified as public land.<sup>125</sup> This category of public land is managed by the Kenya Wildlife Service (KWS), a state corporation established under the Wildlife Conservation and Management Act No. 47 of 2013.<sup>126</sup> KWS is mandated to conserve and manage wildlife in Kenya including their habitats, such as the national parks and wildlife sanctuaries.<sup>127</sup> Whereas there is no explicit requirement for the approval of KWS for REDD+ activities, given its oversight role its approval will be required where the site of REDD+ activities fall within a wildlife protected area or forests that are wildlife corridors. Where REDD+ activities are undertaken in an area listed by KFS as an endangered/threatened ecosystem or habitat, a permit will need to be obtained from KFS.<sup>128</sup></p>

<sup>116</sup> Climate Change Act, 2016, Section 9.

<sup>117</sup> *Ibid*, Section 8 (8) (b).

<sup>118</sup> Draft Climate Change (Monitoring, Reporting and Verification) Regulations, 2021.

<sup>119</sup> *Ibid*, Regulation 13 (3).

<sup>120</sup> Forest Conservation and Management Act, 2016, Section 8 (1).

<sup>121</sup> EMCA, 1999 Section 58 (2).

<sup>122</sup> *Ibid*, Section 58(2).

<sup>123</sup> *Ibid*, Second Schedule Paragraph 2 (5) (b).

<sup>124</sup> Section 23 D, Climate Change (Amendment) Bill 2023).

<sup>125</sup> The Constitution of Kenya, art.62(1)(g).

<sup>126</sup> Wildlife Conservation and Management Act No. 47 of 2013, Section 6.

<sup>127</sup> *Ibid*, Section 7.

<sup>128</sup> Wildlife Conservation and Management (Protection of Endangered and Threatened Ecosystems, Habitats and Species)

<b>County Government</b>	County Governments are custodians of public forests under article 62(2) of the Constitution, and they may grant forest concessions or enter into joint management agreements for forest management activities including carbon project development in forests under their management. County approval will be necessary for the set-up of carbon projects and transfer of carbon rights emanating from projects under their jurisdiction. County Governments also hold unregistered community land in on behalf of the community, <sup>129</sup> and County Government approval will therefore be necessary for any carbon projects established on such land and the transfer of any carbon rights emanating thereunder.
<b>Parliament</b>	The Natural Resources (Classes of Transactions Subject to Ratification) Act sets out a requirement for parliamentary ratification of certain classes of transactions. <sup>130</sup> This includes long-term concessions of gazetted forest resources, which must be ratified by Parliament, to be valid. <sup>131</sup> "Long-term" is however not defined in the Act. The Act also sets out categories of exempted transactions, and exemptions include transactions below a set out threshold imposed by the Cabinet Secretary in charge of environmental matters. <sup>132</sup> No thresholds have been set with regards to forest resources and forestry transactions so far, and this implies that these transactions currently fall under exempted transactions. Should such thresholds be gazetted, parliamentary approval of a transaction falling above the threshold, involving a long-term concession of gazetted (public) forest resources will be necessary.
<b>National Treasury</b>	There is no specific law, making explicit provision for approvals to be sought from the National Government prior to the sale or transfer of carbon credits. The Public Finance Management Act, 2012 and the National Policy on Climate Finance (2018), provide that Treasury bears a key role in managing public finance and is the primary custodian of all matters climate finance, <sup>133</sup> however the scope of this function as relates to carbon finance transactions is not clear. Whereas National Treasury may grant approvals on behalf of the National Government where the carbon rights accrue to the National Government, <sup>134</sup> this authority does not appear to extend to the grant of approvals in the case of private or community projects where the carbon rights do not accrue to the National Government. An early circular by the Ministry of Finance published in the year 2011, directed at State accounting officers, mandated that forestry projects among others, developed under the Clean Development Mechanism (CDM), must be prepared in consultation with the Treasury. <sup>135</sup> Further all Certified Emission Reductions (CERs) can only be transacted with direct approval of the Treasury. <sup>136</sup> This directive however appears to be related to State owned projects, and it is not clear to what extent it is adhered to. It however sheds light on one of the few explicitly set out roles of Treasury in granting approvals for carbon projects.

The Climate Change Act through amendments made in 2023 makes some provision on approvals and authorizations by introducing an element of tracking in law. It sets out a requirement for a registry to be established as a system for tracking carbon rights generated and sold at the national level and from projects. The Act empowers the Cabinet Secretary to authorize the establishment of the REDD+ Registry and other sector registries to feed into the National Carbon Registry,<sup>137</sup> which is proposed to be established under section 23G of the Act. The Act provides that the Cabinet Secretary in charge of climate change matters shall appoint the Designated National Authority (DNA) for market mechanisms, who is the entity or organization granted the responsibility to authorize and approve participation in projects under the Paris Agreement. It also provides for the application of

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Regulations, 2017, Regulation 6(2).

<sup>129</sup> The Community Land Act, 2016, Section 6(1).

<sup>130</sup> Act No. 41 of 2016. Enacted pursuant to Article 71 of the Constitution of Kenya, 2010.

<sup>131</sup> The Natural Resources (Classes of Transactions Subject to Ratification) Act, 2016, First Schedule.

<sup>132</sup> *Ibid*, Section 4(2) (e).

<sup>133</sup> See the Public Finance and Management Act, Act No. 18 of 2012; and the Government of Kenya (GoK), National Policy on Climate Finance (GoK, 2018).

<sup>134</sup> Rule 142, Public Finance Management (National Government) Regulations, 2015.

<sup>135</sup> Republic of Kenya, Ministry of Finance, Treasury Circular No. 9/2011. At <https://www.treasury.go.ke/publications/circulars.html>.

<sup>136</sup> *Ibid*, Treasury Circular No. 9/2011.

<sup>137</sup> Section 7, Climate Change (Amendment) Bill 2023. Proposed amendment of Section of 8 of the Climate Change Act 2016.

corresponding adjustments without detailed guidelines on this application.

In addition, the DNA shall maintain the National Carbon Registry as the custodian of the Registry. The National Carbon Registry is to include among others; registers on the carbon credits projects and programmes implemented to reduce GHG emissions in Kenya; the reduced emissions from deforestation and forest degradation carbon; authorizations granted for the participation in any initiative, project or programme under the Act; the carbon budget and the GHG reduction units; the amount of carbon issued or transferred by Kenya; and the transfer of carbon credits and any carbon credits issued or recognized by Kenya from a national GHG registry account.

Although the Act does not go into detail on transfers, the above provisions on the operation and content of the National Carbon Registry indicates that Kenya is gearing towards the process of transfer. Furthermore, the draft Climate Change (Carbon Markets) Regulations 2023, which aim to operationalize the Act, set out the process by which project developers can have their projects approved. These approvals and authorizations form basis for ownership of the rights over the carbon credits from which the ability to transfer also emanates.

The Act also highlights that going forward, authorization of carbon projects will be mandatory and introduces the offences of unauthorised trade in carbon credit and knowingly selling carbon credits to unauthorized entities; and these offences attract a fine not exceeding five hundred million shillings or an imprisonment of a period not exceeding ten years or to both.<sup>138</sup> This penalty indicates potential for regulations or guidelines regulating the process of transfer by which all entities or persons engaging in carbon markets must adhere to when transferring their carbon rights or credits, failure to which they may be charged with the offence.

It is important that as Kenya develops its registry and the necessary rules and regulations to enable its efficient working, the country also clarifies the legal nature of carbon credits and the ownership of the underlying rights. Fraud and theft cases in carbon registries have demonstrated the importance of legal certainty. For example, the theft of EUAs following phishing attacks on accounts saw a reform in German law to increase legal certainty with the German Emissions Trading Act (TEHG) containing a provision stating that if EUAs are registered in a person's account, then the account is deemed to be correct, and that person has legal title to the EUAs. In addition, the EU Regulation 2019/1122 (as amended) (EU Registry Regulation) contains specific statements about legal ownership of allowances and the finality of transactions.<sup>139</sup>

The appointment of a DNA is pending as well as the development of rules for the authorizations and approvals for entities participating in carbon markets, and for operationalization of the carbon registry, and these are needed to enable certainty in the market.

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<sup>138</sup> Section 33 (1A), Climate Change Amendment Act, 2023.

<sup>139</sup> ISDA, Legal Implications of Voluntary Carbon Credits, (ISDA, 2021).

### Case Study Three: Transfer of carbon rights in Peru<sup>140</sup>

**Payment for Ecosystem Services Law, Law No. 30215 (PES Law):** Peru's PES law makes provisions on carbon rights. The PES Law declares that carbon sequestration and storage including from REDD+ activities is the 'patrimony of the nation,' and as such, carbon rights vest in the ownership of the State. The PES Law establishes a framework that guides its REDD+ initiatives in its Natural Protected Areas (NPAs) (publicly owned land that is declared to be a protected area). The Peruvian State, under the PES Law has the mandate to transfer carbon rights from NPAs. The framework allows for private projects by not-for-profit organizations implemented in the NPAs to continue using their own project baselines until they have been successfully nested. The National Protected areas service (SERNANP), on behalf of the Government, is involved in the transactions of emission reduction and emission rights with not-for-profit organizations through the administration of contracts. The entities are entitled to receive compensation, with the approval of Government.

**A central registry (RENAMI):** The Government of Peru launched the RENAMI in September 2020, which allows the government to oversee the transaction of carbon credits issued by REDD+ initiatives and therefore manage issues of double counting and accounting for achievement of the NDC. The governance and financial arrangements are documented in the central registry (RENAMI). This approach, combined with the centralised legal ownership of carbon sequestration, establishes a framework for the Government to have broad oversight of the REDD+ initiatives and the associated emissions reductions occurring in Peru, including for such emissions reductions to be counted in Peru's national GHG inventory. In its Updated NDC submitted in 2020, Peru explains that one of the benefits of the RENAMI is to conduct the transfer of GHG reductions produced by the mitigation actions of private and public actors in order to participate in the national and international carbon markets. Privately run projects are required to register on RENAMI and they calculate their own reference levels in accordance with the requirements of the applicable voluntary carbon standard for REDD+ such as the VCS.

**Emission Reduction Units (UREs):** Peru's NDC recognizes the existence of emission reduction units and mandates MINAM to administer, register and conduct the accounting emission reduction units in order to ensure the fulfilment of its NDC's targets and goals in accordance with the Paris Agreement. The country Climate Change Framework Law gives MINAM the authority to explicitly monitor and evaluate the emissions reductions from deforestation and forest degradation and to inform the Secretary to the UNFCCC on its implementation. The framework further gives MINAM a general mandate to oversee REDD+ results-based payments which includes designing a process of receiving, administering and distributing benefits from them.

**Projects approval and Nesting Authorities (SERNAP and MINAM):** Peru's SERNANP and MINAM, are the authorities for project approvals and ensure nesting. The entities have also established clear processes for REDD+ projects to follow for the proposed sale and transfer of carbon and use of baselines, which gives investors confidence regarding the integrity of emissions reductions. MINAM also regulates the baselines that REDD+ projects on NPAs can use for the calculation and transfer of GHG emissions reductions. Currently, the country is considering applying to VERRA's Jurisdictional and Nested REDD+ (JNR)9 and to the REDD+ Environmental Excellence Standard (TREES) of the Architecture for REDD+ transaction (ART TREES). The government is also preparing rules that will require all mitigation measures including REDD+ projects to align their carbon accounting methodologies with the national FREL and MRV systems.

Kenya, when creating its carbon rights transfer and approval policy and legal framework needs to ensure that the framework provides for; both the transfer of carbon rights from public and private owners; a central registry that will further ensure transparency and accountability in the transfer and approval processes of carbon rights; and authorities to oversee the transfer and approval processes.

## 2.2.4 Safeguards in the context of carbon rights

Safeguards are defined as "a set of principles, rules and procedures put in place to achieve social and environmental goals", and have been conceptualised and articulated in ways ranging from barriers against the most harmful impacts of REDD+ ('do no harm') to mechanisms to catalyse improved well-being and livelihoods for IPLCs and their territories ('do better').<sup>141</sup> They refer to measures that are put in place to protect people and the environment from any potential negative effects of carbon trading and other market-based mechanisms in

<sup>140</sup> Pollination and Conservation International, *Lessons Learned from REDD+ Nesting Approaches and Recommendations to Kenya*, (Pollination and Conservation International, 2021).

<sup>141</sup> Juan Pablo Sarmiento Barletti et al, *Safeguards at a glance: Supporting the rights of Indigenous Peoples and local communities in REDD+ and other forest-based initiatives*, (Center for International Forestry Research (CIFOR), 2021).



the reduction of GHG emissions. Some of the common safeguards include the inclusion of stakeholder participation in legal frameworks, the entrenchment of environmental protection principles and the requirement for equitable benefits, among others.

The importance of safeguards in REDD+ was entrenched at the UNFCCC Conference in Cancun in 2010 (COP16) that made provision for a set of seven safeguards which should be promoted and supported when undertaking REDD+ activities. The Cancun Agreements, and the subsequent Durban Agreement, also requested parties implementing REDD+ to provide information on how safeguards are being addressed and respected throughout the implementation of the REDD+ activities. Kenya's National REDD+ Strategy in compliance with international commitments, identifies safeguards that are to be applied in all REDD+ activities in the country. Some of these include the principles of transparency and accountability, the full and effective participation of stakeholders, the need to respect the rights of Indigenous Peoples and Local Communities and the enhancement of equitable access to benefits.<sup>142</sup> Kenya also has a National Approach to Safeguards and a Safeguards Information System for REDD+ Implementation that aims to provide a mechanism for results-based payments for developing countries to address drivers of deforestation and forest degradation. The key mechanisms recognized by the Approach include incorporation of the Cancun Safeguards within Kenya's legal framework, the promotion of transparent and effective national forest governance structures, respect for the knowledge and rights of Indigenous Peoples and effective participation of local communities.<sup>143</sup>

Significantly, Kenya's legal and regulatory framework is largely human-rights centric embracing a safeguards approach with a strong focus on protecting Indigenous Peoples, local communities and other persons in vulnerable situations such as children, women, persons with disability, the elderly, amongst others. Specifically, the Climate Change Act, 2016 entrenches the principles of public participation and the right of access to information to allow all relevant stakeholders to get involved in decision making.<sup>144</sup> Further, it strives to mainstream intergenerational and gender equity in all aspects of climate change responses.

This is further bolstered by provisions requiring the National Climate Change Council to ensure equity and social inclusion in the allocation of effort, costs, and benefits to cater for special needs, vulnerabilities, capabilities, disparities and responsibilities. It also provides for the right to access justice in Section 23 where a person can make an application to court in case of violation of rights in relation to climate change.<sup>145</sup> These safeguarding provisions stem from the Constitution which not only encapsulates the principle of public participation in Article 10 but also underscores the right of access to information in Article 35, and access to justice in Article 48, without discrimination to anyone.

Safeguards are also encapsulated in the Climate Change (Amendment) Act, 2023, which expressly provides that Kenya's carbon markets policy will provide for emission credits that will not be taken into account. These will include emission reductions that have been achieved in violation of human rights.<sup>146</sup> It also acknowledges the importance of REDD+ safeguards, requiring that all REDD+ projects are required to undergo REDD+ safeguard standards assessment.<sup>147</sup> However the Amendment Act fails to set out the modalities of undertaking the assessment and there are currently no guidelines in Kenya to inform project proponents on what a REDD+ safeguards standards assessment would entail.

<sup>142</sup> National REDD+ Strategy 2021.

<sup>143</sup> National Approach to Safeguards and A Safeguards Information System for REDD+ Implementation.

<sup>144</sup> Section 24, Climate Change Act 2016.

<sup>145</sup> *Ibid*, Section 23.

<sup>146</sup> Proposed new Section 23 A (d) (ii), Climate Change Act 2016.

<sup>147</sup> *Ibid*, Proposed Section 23 D.



The Amendment Act also makes it mandatory for carbon project proponents with land-based projects to enter into Community Development Agreements (CDA) with the impacted communities, with national and county governments overseeing and monitoring negotiations.<sup>148</sup> The Amendment Act states that the CDA's contents are to include the annual social contributions of the "aggregate earnings" of the previous year to the community, defined as *"the total of all income in a carbon project without adjustment for inflation, taxation or types of double counting."* Additionally, the CDAs are to stipulate the mode of sharing benefits from carbon markets and carbon credits between project proponents and the impacted communities. Regarding the annual social contributions, the contribution for land-based projects, which includes REDD+, is set to be at least forty per cent (40%) of aggregate earnings.<sup>149</sup>

The Act also provides for dispute resolution mechanisms ensuring communities have access to remedies. Disputes arising from land-based projects are to be subjected to the dispute resolution mechanism set out in the CDA in the first instance and shall be resolved within thirty days from the date it is lodged. Where disputes are not resolved within thirty days, they are to be referred to the National Environment Tribunal (NET).

While there is a framework in place for REDD+ safeguards, the presence of overlapping laws legislating on similar matters such as on benefit sharing, threaten the ability of communities to benefit from their carbon rights, as investments are often hampered where the investment environment is unclear, unfair or burdensome. While the Climate Change (Amendment) Act 2023 requires project proponents in the case of land-based projects to enter into CDAs, the Natural Resources (Benefit Sharing ) Bill, 2022 proposes project proponents (defined as "affected entities") exploiting forests (defined as using them for commercial benefit), to also enter into "benefit sharing agreements" with county governments, with benefit sharing funds being allocated to both the county and local communities, and regardless of whether or not the county has any involvement in the project or owns the lands at issue.

If the benefit sharing Bill is passed as currently drafted it may create confusion in the forestry sector's benefit sharing process by causing a duplication of efforts. REDD+ project proponents will be forced to comply with two different laws touching on the same subject matter with challenges of overlapping institutional mandates and increased expenses in terms of time and cost due to the requirement for multiple benefit sharing contracts.

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<sup>148</sup> Section 23E(5) of the Climate Change (Amendment) Act 2023.

<sup>149</sup> *Ibid*, Section 2.





Part 3



# Conclusion and Recommendations



### 3.1 Conclusion

Kenya has an existing legal and regulatory framework that has supported the development of REDD+ projects in the country. The framework however needs to be strengthened to ensure it meets the critical requirements for clarity on carbon rights, to facilitate greater access to forest carbon finance, both results-based payments and carbon market financing. Particularly, as Kenya designs its approach for nesting forest carbon projects into a jurisdictional REDD+ programme, as well as sets out to enhance integrity in its VCM approach, engage more fully with Article 6 markets and overall meet its NDC targets, there is need for more coherence and further certainty on who owns forest carbon and the underlying rights. There is also a need for conceptualization of carbon credits in the country and legal certainty on whether they are treated as commodities, financial instruments or other assets. Such clarity is important not only important as it sets a clear indication of how carbon credits are treated from a tax, accounting, insolvency, and investment protection perspective.

The existence of a land and forest ownership and tenure system hinged on the Constitution of Kenya and laws on the management of land, forests and other natural resources provides guidance on ascertaining the legal owner forest carbon and associated rights in REDD+ projects. The presumption, based on a review of these laws, is that ownership of forest carbon is tied to the ownership or user rights attaching to land or forests. The challenge that arises in this regard is that this is an interpretative position and there is need for its realization in a manner that ensures the rights of Indigenous Peoples and Local Communities are protected at all instances, and they benefit from the carbon and non-carbon benefits accruing from REDD+ activities. Clarity on ownership is also necessary in order to be clear on the rights and responsibilities of government over REDD+, the nesting of site-scale projects into a jurisdictional REDD+ programme and respect of the ownership of sequestered carbon of all stakeholders. This is particularly important as the country sets out to meet its NDC targets.

Strengthening carbon rights must go hand in hand with strengthening tenure rights, given the interlinkage between carbon rights and landholding. Where there are significant challenges in the underlying land and forest tenure rights, REDD+ projects are affected as where communities, public and private persons lack proper title to hold forestland, they are unable to pass valid title to sequestered forest carbon or benefit effectively from a REDD+ programme. As such the different ways that communities can be involved as owners of carbon rights or beneficiaries in REDD+ need to be strengthened and any requisite registration or contracting done.

Kenya's laws allow communities to hold rights to carbon and benefit in the case of community land, where the land is registered in accordance with the Community Land Act, 2016, or they are organized as a Community Forest Association with user rights in public forests indicated in a Participatory Forest Management Plan (PFMP) and Forest Management Agreement (FMA) in line with the Forest Conservation and Management Act, 2016. They may also benefit where county governments hold former trust land forests or unregistered community land and ensure communities around these forest resources are included in the conservation, management and benefit sharing. However, the full implementation of these laws on communities and their participation in the management of forests is yet to happen in a manner that enables the full respect of community rights.

Additionally, it is imperative that Kenya develops regulations that operationalize the new carbon markets provisions that have been introduced by the Climate Change (Amendment) Act 2023. This will enable the operationalization of key provisions calling for the implementation of carbon projects that adhere to social and environmental safeguards. Importantly in the context

of REDD+ Kenya's legal framework already contains common safeguards such as the inclusion of stakeholder participation in legal frameworks, the entrenchment of environmental protection principles, and the requirement for equitable benefits among others. These can be traced in various legal instruments including the Constitution, the Climate Change Act 2016, the National REDD+ Strategy and the National Approach for Safeguards. However, while there exists a framework on REDD+ safeguards, there is a lack of guidelines or regulations that provide the modalities of undertaking the REDD+ safeguards assessment set out in the Amendment Act. Furthermore, the presence of overlapping laws on benefit sharing as characterized by the requirement for different benefit sharing agreements under the Climate Change Amendment Act and Natural Resources (Benefit Sharing) Bill, poses a threat on the ability of communities to benefit from their carbon rights, as investments are often hampered where the investing environment is unclear. It is therefore essential that Kenya streamlines such laws to promote ease in operations.

On the transfer of carbon credits, it is important to reiterate that clarifying the transferability of carbon credits is central to the working of REDD+. A clear approvals and authorizations framework is increasingly important for giving governments oversight of the REDD+ activities in their jurisdiction, ensuring integrity of transactions, preventing double claiming and in effect stimulating climate finance flows. Kenya has made an attempt to clarify the transfer of carbon credits through the Climate Change Amendment Act which establishes a National Carbon Registry and a sectoral REDD+ Registry that are to contain a register of transferred carbon credits. Furthermore, the Climate Change Amendment Act criminalizes the unauthorized transfer of carbon credits. These provisions, however, do not set out the modalities of how the transfers are to be made nor do they set out what unauthorized transfers are. There exists an opportunity for law makers to develop regulations that provide further clarity on these issues.

As this report has highlighted, there are numerous entry points for improving the legal support for carbon rights. The comparative study of carbon rights in different jurisdictions such as Peru and Australia present some lessons that Kenya can benefit from immensely. From Peru, Kenya could consider adopting clarity in the transfer of carbon credits through designating a body with the responsibility of ensuring that emission reduction units are administered, and carbon accounting done in an efficient manner with linkages to NDC targets and goals. With regards to the conceptualization of the ownership of rights emanating from sequestered carbon, Kenya could also benefit by expressly clarifying what constitutes a carbon right, who owns it and how is this registered, if at all. This would assist in determining the treatment of carbon credits, such as from a tax perspective, as exemplified by Australia.

### 3.2 Recommendations

- a. **Assert the ownership of forest carbon in legislation** - To enable clarity thus facilitating investments in REDD+ and also ensure all stakeholders in REDD+ benefit from the programme, Kenya should have legislation asserting the rightful owner(s) of forest carbon in line with the Constitution, which is the overarching law in the country. This will ensure the rights of Indigenous Peoples and Local Communities are protected at all instances, and they benefit from the carbon and non-carbon benefits from REDD+ activities, whilst private investment in REDD+ is promoted as opposed to disincentivized.
- b. **Clearly conceptualize and define the legal nature of carbon credits** – The absence of a clearly conceptualized and defined position on what is the legal nature of a carbon credit hampers clarity on the correct treatment of forest emission reductions or removals and the underlying rights. Kenya should therefore determine through legislation whether carbon credits are intangible property rights, a natural resource, a commodity or a financial instrument.

- c. **Clarify and streamline procedures and processes for transfer of carbon credits –** Regulations to operationalize the Climate Change Amendment Act are necessary to clarify the transfer process for carbon credits and the underlying rights. The Act contains provisions on the trade of carbon credits as a result of a bilateral, or multi-lateral trading agreement, trading with a private entity or in a voluntary carbon market, the designation of a DNA and establishment of a carbon registry. The operationalization of these key provisions is necessary, within a framework that sets out a clear approval and authorization process codified in law to eliminate all ambiguity on the process and the roles and responsibilities of different actors and sector players.
- d. **Reform and strengthen Kenya's land and forest tenure –** Due to the fact that carbon rights are linked to land and forest tenure in Kenya, there exists an intricate relationship between the tenure system and ownership of carbon rights. There is therefore a need to reform the tenure systems by resolving ongoing contested tenure and land right claims including historical land injustices, so as to provide clarity on the claims to the underlying carbon rights. This necessitates the implementation of community land laws as envisage by the Constitution and the Community Land Act as well as solidifying the user rights of communities in gazetted forests. This is ultimately important in ensuring that the rights of Indigenous Peoples and Local Communities, who often have a critical stake in decisions about land and resource governance, are respected and upheld.
- e. **Uphold social safeguards in carbon rights decision making in order to balance community rights with fostering REDD+ investments –** Kenya should enact regulations and guidelines that further enhance the safeguards approach to REDD+ that is set out in the country's policy and legal framework. These include guidelines or regulations on the modalities of carrying out of REDD+ safeguards assessment. Further, laws and regulations in the country should also aid and not hamper REDD+ investments and the ability of communities to benefit from their carbon rights. To this end, REDD+ should be carved out of the Natural Resources (Benefit Sharing) Bill 2022, whose provision on benefits sharing in the exploitation of forests overlap with benefit sharing provisions set out in the Climate Change Amendment Act.



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For any enquiries, please get in touch via email at [communications@ukpact.co.uk](mailto:communications@ukpact.co.uk)

