

Legislative Guidelines for the establishment and operation of Locally Managed Marine Areas in Kenya

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Legislative Guidelines for the Establishment and Operation of Locally Managed Marine Areas in Kenya

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Executive Summary

Sustainable management of the coastal and marine environment in Kenya requires collaboration between government, at both the national and county level, and coastal communities. Cooperative management will ensure that different stakeholders are able to contribute to a shared objective. The introduction of Locally Managed Marine Areas (LMMAs) has been based on this rationale and the need to ensure co-management arrangements between communities and government agencies in managing marine resources. LMMAs serve more than just conservation imperatives. They also enable communities to alleviate poverty by giving them the opportunity to derive benefits from marine resources in the process of undertaking conservation initiatives.

The lack of a supportive legal framework has, however, hindered the sustainable growth of LMMAs. Many LMMAs have been established in Kenya through the support of the State Department of Fisheries. However, the legal framework does not explicitly mention LMMAs or give them clear legal and operational guidance. This report has consequently made proposals for guidelines for the legal establishment and operations of LMMAs in Kenya. These guidelines have involved significant consultations with many stakeholders including government agencies and their legal officers. The guidelines are geared towards providing clarity on procedures and implications of establishment of LMMAs. They are also intended to facilitate greater collaboration amongst national government agencies in supporting LMMAs. In addition they provide avenues for engagement between LMMAs and county governments.

The guidelines proposed here require wide consultations, public participation and education and awareness creation amongst communities for their acceptance and legitimacy. It is hoped that these legislative guidelines will be incorporated into national guidelines on establishment and operations of LMMAs, adopted by Government and issued formally to guide communities.

The success of LMMAs will also require continued training and capacity building for community members, financial sustainability and collaboration with several stakeholders.

1. Introduction

The Kenyan coastal and marine environment is a site of rich biodiversity with high ecological and socio-economic value. The State of the Coast Report (2009), The Integrated Coastal Zone Management (ICZM) Action Plan (2011-2015) and the Draft ICZM Policy (2014) capture this position and detail the extent of the resources at the coast. Kenya's coastline extends about 600 km, from Somalia's border at Ishakani in the north to Tanzania's border at Vanga in the south.

The coast is home to a rich and diverse array of flora and fauna. The main resources include land, rivers, lakes, estuaries and other wetlands, grasslands, coastal and mangrove forests, sea grass and coral reefs. These resources are vital to local communities acting as a source of livelihood. In addition they support the coastal and national economy. They provide important goods and services, performing ecological and social functions. Kenya's coast is also home to numerous threatened species; 38% of the 159 tree and shrub species; 27% of the 71 birds species, and 5 of 9 mammalian species classified as threatened are found in the coast. These species include marine mammals (e.g. whales, dolphins and dugongs), sea turtles, shoreline birds, fish, and terrestrial species such as Colobus monkeys and Tana mangabeys.

The main sectors that support the economy at the coast include tourism, fishing, shipping, agriculture, forestry and mining. Despite its importance, the coastal environment is under threat from a range of pressures largely anthropogenic including pollution, land degradation, unregulated development, climate change, over-fishing, erosion and loss of habitat. The increasing pressure that coastal areas face is largely attributable to the ever increasing human population resulting into higher demands for natural resources and goods and services that the marine ecosystem provide. The activities practiced in these coastal areas have thus continued to put marine resources under increasing pressure as the people are resorting to resource use practices that are environmentally deleterious to cater for their needs. As a consequence, Kenya's marine environment, ecosystems, and associated resources have shown signs of degradation as a result of over-exploitation stemming from unregulated use. This negatively affects and threatens the survival of many communities who continue to depend on these resources for their livelihoods.

To address these critical issues, the government has over the years undertaken various measures to ensure sustainable management of natural resources including coastal and marine resources. The initial effort was through the adoption of Sessional Paper No.3 of 1975, *Statement on the Future of Wildlife Management Policy in Kenya* followed by the enactment of the Fish Industry Act and the Wildlife (Management and Conservation) Act in 1968 and 1976 respectively. It is from these initiatives that the government established the first Marine Protected Area (MPA) in Kenya. Since then, conservation of marine resources has largely been undertaken through MPAs established under the Wildlife (Management and Conservation) Act. The use of MPAs as a tool for conservation has also hinged on the fact that Kenya is a signatory to various international instruments, such as the Convention on Biological Diversity (CBD) which advocates for the establishment of MPAs for the conservation of marine resources.

In establishing MPAs, the Government, local communities and other stakeholders have sought to achieve the following goals:

- Preservation and conservation of marine biodiversity for poverty alleviation;
- Provision of ecologically sustainable use of the marine resources for cultural and economic benefits; and
- Promotion of applied research for educational awareness programme, community participation, and capacity building.

Despite their utility, MPAs as established in Kenya, have been accused of excluding local communities. As a consequence, their implementation has faced several challenges often resulting in continued degradation of marine resources. In response to these challenges and failures from marine conservation efforts, recent trends have seen communities at the forefront in the quest to conserve marine resources through the establishment of conservation areas. In Kenya, these have taken the form of Locally Managed Marine Areas (LMMAs). These have been established voluntarily by members of given localities and give communities an opportunity for structured engagement in the conservation of marine resources while deriving benefits from the same resources.

Despite this, challenges continue to exist concerning the manner in which LMMAs are to be established as there lacks a clear legal framework for the establishment of marine community conservation areas. This lacuna in the legal framework has therefore diminished the effectiveness of conservation initiatives that have been undertaken. It has, therefore, become imperative that a legal framework and guidelines be developed to guide the manner in which these LMMAs are established and operate in Kenya.

The survival and efficacy of LMMAs is hinged on the wider context in which they are planned and the framework in which they operate. In the Kenyan context, while MPAs have been used for quite a long time, they have been largely led by the government with very minimal involvement of local communities. This approach of non-involvement of local communities started in the colonial period, when communities were viewed as being inimical to sustainable management of resources. Consequently laws, policies and practices were geared towards keeping communities from local resources. However, following trends within the continent, pioneered in the context of wildlife with Zimbabwe's Campfire Programme and spreading to fisheries in the form of establishment of Beach Management Units (BMUs), the process of Community Based Natural Resource Management (CBNRM) efforts gained traction. For marine resources, Kenyan communities with support from conservation groups have pioneered the establishment of Locally Managed Marine Areas (LMMAs), which go under a wide variety of generic names in Kenya including marine community conservation areas (CCAs), and also have specific legal names such as co-management area. These are listed in Annex I. Due to lack clarity on the legal framework and for long an unsupportive constitutional framework, the process has taken a practical approach. Based on the experiences to date and to ensure sustainability of these initiatives, this study sought to develop guidelines on a legislative framework for the establishment and operations of LMMAs in Kenya.

This report provides recommendations for guidelines for a legislative base for the establishment of LMMAs at the Kenyan coast. It was developed by a Task Force established by CORDIO East Africa, under a UNDP Small Grants Programme (SGP) GEF

Project: *Mainstreaming Biodiversity Conservation into Marine Ecosystems and Fisheries Management in Kenya* (December 2013 to April 2015). The members of the Task Force are the authors of this report. The development of the guidelines also involved consultations with government legislators from relevant departments (see Annex One). It is hoped that these legislative guidelines will be incorporated into national guidelines on LMMAs being developed by The East African Wildlife Society (EAWLS).

The specific objectives of the Task Force from which this report derives were to:

- Develop national legislative guidelines for marine LMMAs for the Kenyan coast;
- Agree on relevant legislation to anchor the guidelines;
- Link legislative guidelines to overall guidelines being developed by EAWLS;
- Undertake interviews with key relevant government legislators;
- Conduct limited consultations with LMMAs existing or under establishment;
- Present the draft recommended guidelines at a stakeholder consultation workshop convened by CORDIO and EAWLS in January 2015 to discuss the recommendations.

2. Conceptualising LMMAs in Kenya

2.1 Community involvement in conservation of the marine environment

Throughout the world, rural communities and indigenous people have fostered belief systems and social norms that have encouraged the conservation of natural resources and enforced societal limits to over-exploitation and profligate use of common natural resources. Conservation is, therefore, a concept that is germane to many rural communities and also practiced by these communities. These efforts, have, however, not always received official government support in many countries.

The involvement of communities in conservation arises from the property relationships that the communities have with the resources in the areas they stay. Communities have deeply held historical, national, ethical, religious and spiritual values with the natural areas where they live. Such areas have been used in the past by communities for grazing and fishing areas, community shrines and also for recreation. In addition, their identities have been influenced by the interactions they have had with these areas. Their survival is consequently inextricably linked to the said areas. The communities have thus adopted conservation practices in those areas so as to keep alive the community values that give a sense of identity, connection or meaning.

Communal management of property has been in existence in many jurisdictions since time immemorial. Such communal ownership and management has been preferred to individual ownership of common pool resources due to the fact that it would be too expensive to individualise these resources. Efforts have thus been made communally to protect such resources, for example, ecologically sensitive areas. Such ventures have led to the emergence of concepts like community-based environmental protection and community based natural resource management. This is the background against which community

conservation initiatives arose. Community conservation initiatives emerged from the recognition of the fact that strictly protected areas often failed to consider the interests of local communities thus reducing their willingness to support or abide by conservation regulations. In the marine environment, these initiatives have been named Locally Managed Marine Areas (LMMAs).

These initiatives succeed by taking into account local social, economic, and environmental conditions as well as community values. Additionally, they create a sense of local ownership of issues and solutions. In this regard, long-term solutions are developed collectively by community members. The communities are incentivised into this by the benefits they get from such endeavours such as poverty alleviation and livelihood benefits.

Various forms of locally managed conservation areas (terrestrial and marine) have been established that incorporate governance by indigenous people and local communities, including settled and mobile groups. This model of conservation is now widespread and has been adopted in many parts of the world. A majority of LMMAs comprise natural and/or modified ecosystems governed through customary laws or other effective means to guide the management practices. The various administrative systems that have been identified in existing LMMAs include: areas administered by individual owners of the land; areas administered by the entire community due to communal ownership of land; and lastly, areas administered by various communities who have rights over the same lands at different times. Management and regulation systems are thus developed through the various levels of ownership and control of these resources.

2.2 Community based conservation approaches in Kenya

Kenya has experienced exclusionary practices in environmental conservation as local communities were largely excluded from entering most of the ecologically sensitive or valuable areas by the country's legal and policy frameworks. The trend changed as a result of developments across other parts of the world, local advocacy efforts and need to adhere to international commitments. The Rio Declaration adopted after the United Nations Conference on Environment and Development, for example urged for public participation in environmental governance and natural resource management.

Over the past decade, Kenya has promoted the involvement of local communities in the management of natural resources. The passage of the Forest Act in 2005 provides evidence of this as it attempts to ensure that communities participate in resource conservation activities. This is similar to the situation in traditional Kenyan societies where land and associated resources were considered as commons whose access was based on one's membership to a given community. These communities, therefore, established systems on how decisions on the use of these resources were to be made and mechanisms to ensure compliance. The colonial government in Kenya viewed the commons as *terra nullius* and took the perspective that radical title in property vested on a juridical person, which in this case was the government, and that the government had the absolute authority to grant exclusive rights of use and disposition. In this regard, many communities were excluded from conservation initiatives, a trend that was inherited by the post-independence government.

While local communities have over time made several attempts to assert their ownership and access rights to these natural resources, such efforts have in many cases failed. Historical marginalisation of communities in natural resource management and

expropriation of community based natural resource rights have led to alienation of communities and undermined their ability (based on inherent social capital) to manage their environment and natural resources effectively.

As a result of the growing recognition of the importance and rights of local community to be involved in the management of natural resources, efforts have been made at the Kenyan coast to involve local communities in conserving the marine environment. In actualising their role in the conservation of marine resources in Kenya, communities have established LMMAs in a bid to separate them from government managed MPAs. This is also seen to be a departure from the top-down approach that has in the past been adopted in conservation. Along the Kenyan south coast, the establishments of LMMAs by communities started with support from partners such as the East African Wildlife Society and IUCN, who have assisted communities to take steps to establish LMMAs. Various LMMAs have been established, including Kuruwitu, Tiwi, Msambweni, Shimoni, Wasini, Mkwiro, Majoreni, Vanga, Jimbo Wasini and Kibuyuni.

One of the most successful LMMAs that has been established is Kuruwitu Community Managed Conservation Area (KCMCA). This LMMA was established by the Kuruwitu Conservation and Welfare Association (KCWA) in 2006, with support from the East African Wildlife Society (EAWLS) and IUCN. One of the key goals that led to the establishment of this LMMA was to set up a 'no-take zone' to allow the marine ecosystem to recover from over-fishing and years of damage to the coral. The establishment of this conservation area has led to members of the local community benefitting from the conservation measures being practiced resulting in, for example, increased fish catch in the surrounding areas and some revenue from tourism based snorkelling in the no-take zone.

The communities in these areas have relied on their traditional ecological knowledge in extending conservation measures to the LMMAs. In return, the protection of these areas has benefited the communities economically by providing them with alternative sources of revenue. The opportunities that have resulted from the conservation activities in marine areas are immense hence the push for and acceptability of community led conservation activities at the Kenyan coast. These positive results from LMMAs have provided impetus for legal recognition and backing to a practice that is increasingly gaining acceptance and support amongst local communities along the Kenyan coast.

2.3 Defining Key Terms

i. Conservation

At the centre of operationalising LMMAs is the drive to conserve marine resources. The two terms 'conservation' and 'preservation' are often confused and sometimes used interchangeably, although they mean different things. Conservation is an aspect of the concept and process of sustainable development. Its focus is on sustainability. It calls for using resources in a manner that ensures that they are not wasted or exhausted so that future generations can also be able to enjoy the benefits of the same resources. Used within the context of environmental management, conservation refers to the use of renewable resources sustainably so as to avoid waste and thus protect the threshold of sustainability. It differs from preservation which focuses on setting aside or leaving alone natural resources so they are unaffected by human activities as much as possible and thereby maintain the quality of the natural resources and maintain ecological processes fully intact.

ii. Coastal Zone

The Draft ICZM Policy provides that the Coastal zone consists of a closely connected terrestrial and marine environment. In Kenya the marine environment would comprise the water, beach and highest sea level water mark ever recorded. A critical question in this definition is what is the highest water mark, that is during the highest Spring tide of the year, what is termed the Mean High Water Spring (MHWS) mark. In Kenya the Survey Act has settled this debate and defined the coastal zone to include 60 metres above the MHWS mark.

The coastal environment thus depends on the definition that is adopted by a country. During the development of the South African White Paper for Sustainable Coastal Development, the Coast was defined as “a distinct, but limited spatial area that gets its character mainly from the direct interaction between land and sea (and associated air masses). The coast can be defined as an area with a landward and a seaward boundary that includes:

1. Coastal waters, which extend from the low water mark into the sea, up to the point where these waters are no longer influenced by land associated activities
2. The coastline or sea shore, which is the area between the low and high water marks
3. Coastlands, which are inland areas above the high water mark that influence or are influenced in some way by their proximity to coastal waters.

iii. Marine Protected Areas

Marine protected areas have been developed out of the need to address pressures on marine ecosystems and ensure they are conserved for the benefit of society. The IUCN defines a protected area as a “a clearly defined geographical space, recognised, dedicated and managed, through legal or other effective means, to achieve the long term conservation of nature with associated ecosystem services and cultural values.” Protected areas include national parks, reserves and community conserved areas.

Marine Protected Areas (MPAs) are thus a form of protected areas established in marine areas with a view to protecting the marine environment from human pressures in order to conserve it. MPAs restrict human activity for a conservation purpose, typically to protect natural or cultural resources. The IUCN defines MPAs as “*Any area of the intertidal or subtidal terrain, together with its overlying water and associated flora, fauna, historical and cultural features, which has been reserved by law or other effective means to protect part or all of the enclosed environment.*”

The Convention on Biological Diversity defines the wider term of Marine and Coastal Protected areas in the following terms:

“Any defined area within or adjacent to the marine environment, together with its overlying water and associated flora, fauna, historical and cultural features, which has been reserved by legislation or other effective means, including custom, with the effect that its marine and/or coastal biodiversity enjoys a higher level of protection than its surroundings.”

iv. LLMAs

Locally Managed Marine Areas emerged as a response to the increased need to involve locally communities in the management of natural resources, generally under the concept of co-management. In the marine environment, LMMAs are an area of marine and coastal environment that has been set aside and whose management is led by local communities.

The concept and approach was piloted initially in the Pacific region. Although a recent innovation, LMMAs derive from the traditional role of communities in managing fisheries and marine resources.

LMMAs are defined as “*an area of nearshore waters and coastal resources that is largely or wholly managed at a local level by the coastal communities, land-owning groups, partner organisations, and/or collaborative government representatives who reside or are based in the immediate area.*”

While protected areas focus solely on conservation and possibly preservation as well (see definitions above), LMMAs are strongly geared towards sustainable use and economic benefits to communities. They therefore provide a window by which communities can engage in conservation of marine resources.

3. Legal framework relevant to LMMAs

One of the important considerations that have to be taken into account in establishing LMMAs is the need for a proper legal framework. In coming up with legislation or guidelines to govern LMMAs at the coast, a preliminary task for the legal drafter is to undertake a legal and institutional inventory and analysis of relevant law and policy. The scope of the analysis should be guided by the objectives sought in establishing the LMMA. Focus should be on the legislation which not only provides for the limited area where conservation activities are to be undertaken, but also legislation which has provisions that cater for the wider environment around these conservation areas.

There are several legislations that govern the management of the environment in Kenya. For example a recent analysis (Samoilys et al. 2011) found over 48 pieces of legislation across 14 Ministries and a further nine Authorities that are relevant to the marine environment in Kenya. As stated earlier in this report the marine ecosystem is rich in biodiversity. Consequently, legislations that govern the different flora and fauna and ecosystems found in the marine area are relevant in providing a legal framework for governing the marine environment. The full map of relevant legislation range from the Constitution, international and regional instruments to which Kenya is a party, national legislation to county legislation. Here we consider the main pieces of legislation which are relevant to LMMAs:

- Environmental Management and Coordination Act
- Fisheries Act
- Wildlife Conservation and Management Act
- Forests Act
- Agriculture, Fisheries and Food Authority Act
- The Land Act
- The Physical Planning Act

- The Urban Areas and Cities Act
- The Devolved Government Act
- Continental Shelf Act
- Merchant Shipping Act
- The Kenya Maritime Authority Act

Regional and international Conventions that are relevant include:

- United Nations Convention on the Law of the Sea
- United Nations Conventions on Wetlands of International Importance (Ramsar Convention)
- Convention on Migratory Species
- Convention on Biological Diversity
- Nairobi Convention for the Protection, Management and Development of the Marine and Coastal Environment of the Eastern African Region
- African Charter on Human and People's Rights
- The East African Community Treaty
- United Nations Declaration on the Rights of Indigenous Peoples
- Post-2015 Sustainable Development Goals

While all the above legislations, Conventions and Declarations are useful for the governance of the marine ecosystem, the discussions in this section is restricted to those that have provisions which are useful for the establishment and operations of LMMAs and can consequently serve as a basis of deriving guidelines and anchoring the operations of LMMAs in Kenya.

3.1 The Constitution of Kenya

Until 2010, Kenya's constitutional framework had paid very little attention to conservation of the environment. The sections of that Constitution that dealt with land focused largely on protection of private land rights from compulsory acquisition by the state without due process and just compensation. Similar provisions also existed relating to the setting apart of Trust Lands. The establishment of LMMAs and their operations up to 2010 therefore happened in spite of the Constitutional architecture in Kenya. The Bill of Rights then had no express mention of environment. Over time, however, courts in Kenya argued that the right to a clean and healthy environment was a key component of the right to life. Consequently, even though the Bill of Rights was silent on environmental issues, the fact that it contained provisions protecting the right to life meant that promoting the conservation of the environment was an integral aspect of human rights promotion. The Constitution adopted in August 2010 is, however, a marked improvement on its predecessor. It has robust

provisions on conservation of the environment and also the involvement of local communities in the process.

The preamble to the Constitution underscores the importance of the environment as part of the country's heritage. Further the achievement of sustainable development, a concept that gives impetus to all conservation efforts, including of the marine environment, is included in Article 10 as a national value and principle of governance. Every policy and legislative action in the country must consequently be undertaken in such a manner as to adhere to the concept of sustainable development. In addition, the Bill of Rights includes environment rights as a fundamental human right.

Chapter five of the Constitution addresses land and environmental matters. Article 69(1) (a) obligates the state to "ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits." This provides the basis for ensuring that in managing natural resources there is promotion of the objective and imperative of conservation.

The word marine appears in Article 260 of the Constitution, under definitions in the following manner. "Land includes marine waters in the territorial sea and the exclusive economic zone." Secondly, under the Fourth Schedule of the Constitution, one of the functions of the national government is transportation, which is defined to include marine navigation.

Since the definition of land includes marine waters, the provisions of Chapter five dealing with land, specifically Articles 60-68 are relevant. The Constitution clearly provides at Article 61 that "all land in Kenya belong to the people of Kenya collectively as a nation, as communities and as individuals." This underscores the sovereign nature of Kenyans and their overall link to land justifying the need for the management of land to be undertaken in a manner that takes into account the interests of all Kenyans. In using, holding and managing land, it is a Constitutional requirement that the same be undertaken in a sustainable manner. Specifically Article 60 of the Constitution calls for sustainable and productive management of land resources and sound conservation and protection of ecologically sensitive areas, both of which are relevant as justification for the operations of LMMAs with a focus on conservation and sustainable utilisation of resources.

Land is categorised into three, namely Public Land, Private Land and Communal land. Public Land as defined includes the territorial sea, the exclusive economic zone, the continental shelf and all land between the high and low water marks. As will emerge from the definition of LMMAs, the land which forms part of the area of a LMMA, largely falls within the definition of public land. Even if the LMMAs were to include land that is either private or communal the key question will be what is the objective of conservation and since LMMAs' conservation objectives focus on areas partly in the sea, public land becomes the operative tenure. The constitutional provisions on public land, private land and communal land would consequently be useful in the discussions because clearly LMMAs have linkages with land as defined within the Constitution. Secondly, whatever the management objective of a LMMA is, it does not seek to change tenure rights or ownership of land. Instead its focus is joint management of the environment and sharing of benefits that derive from those conservation efforts. Constitutional rules on land tenure are useful to the extent that they influence management and benefit sharing arrangements.

An important rationale for the establishment of LMMAs is the need for participatory governance. LMMAs seek to provide an avenue for local communities to be involved together with the state and state agencies in the management of marine resources. The

Constitution recognises public participation as a key aspect of governance in Kenya. Article 10 lists participation as one of the key values and principles of governance. Every sector and governance process has, therefore, to incorporate public participation in its processes. Secondly, the need for increased public involvement in governance was one of the key imperatives for the adoption of a devolved system of government. One of the stated aims of Devolution in the Constitution is to improve the participation of the people in decision-making. Other aspects that capture public participation include legislature at national and county level, public financial management, public service and as a function of county governments. In addition, in the process of conservation and management of natural resources, Article 69 of the Constitution obligates the state to “encourage public participation in the management, protection and conservation of the environment.” Public participation is thus a constitutional requirement for policy implementation processes. One can deduce that to the extent that LMMAs provide avenues through which the state could encourage the participation of communities in the management of the marine environment, they have constitutional support.

The Constitution consequently gives support to the involvement of communities in managing natural resources, including marine resources. Co-management has, therefore, received Constitutional anchorage since 2010. LMMAs can thus be seen within the overall Constitutional provisions for public participation, conservation of natural resources and equitable sharing of the benefits that derive from natural resources.

3.2 International and regional conventions and agreements

Kenya is party to several international conventions that are relevant to the discussions on LMMAs. Three particular themes covered by international agreements come to the fore. These are agreements related to the marine environment, those dealing with human rights and those addressing the rights of indigenous populations. On becoming a party to any international agreement, Kenya becomes duty bound to adhere to the commitments under those agreements. The Constitution at Article 2(5) provides that, “*the general rules of international law shall form part of the laws of Kenya.*” Article 2(6) of the Constitution then stipulates that: “*any treaty or convention ratified by Kenya shall form part of the laws of Kenya under this Constitution.*” These articles make international Conventions ratified by Kenya to be part of relevant laws of Kenya. Consequently any Convention that Kenya has ratified and has provisions addressing aspects of the operations of LMMAs would be relevant. The key provisions of these Conventions relevant to LMMAs are highlighted below.

i. The Convention on Biological Diversity

The Convention on Biological Diversity (CBD) was adopted in 1992 at the United Nations Conference on Environment and Development. It has three objectives, namely:

- Conservation of biological diversity
- Sustainable use of the component of biological diversity
- Fair and equitable sharing of benefits arising out of utilization of genetic resources.

To implement these objectives the Convention adopts both in-situ and ex-situ conservation measures, the former focusing on creation of protected areas. It is these that are relevant for the existence of LMMAs at the national level.

At the 1st Conference of the Parties (COP) meeting, the parties identified conservation of marine and coastal biodiversity as an important target. Since then parties to the Convention have taken several actions to realise this target. For example, the 4th COP adopted a work plan, based on scientific advice, which recognised the use of local and indigenous community knowledge and action at local and national level. This underscored the importance of community involvement in the conservation of marine environment and resources, a key underlying aim of LMMAs.

Further when the 10th COP in 2010 adopted the Aichi targets, target 11 focused exclusively on the marine environment. It targeted conserving “*at least 17 per cent of terrestrial and inland waters, and 10 per cent of coastal and marine areas, through effectively and equitably managed, ecologically representative and well-connected systems of protected areas and other effective area-based conservation measures.*”

Establishing LMMAs are a useful avenue for the country to work towards meeting its commitments under the Convention on Biological Diversity including achieving Aichi target 11.

ii. The Convention for the Protection, Management and Development of the Marine and Coastal Environment of the Western Indian Ocean (The Nairobi Convention)

The Nairobi Convention was signed in 1985, came into force in 1996 and was amended in 2010. It is one of the 17 Conventions under the Regional Seas Conventions. The Parties to the Convention are: Comoros, France, Kenya, Madagascar, Mauritius, Mozambique, Seychelles, Somalia, Tanzania and the Republic of South Africa.

The Convention provides a regional legal framework and coordinates the efforts of the member states to plan and develop programmes that strengthen their capacity to protect, manage and develop their coastal and marine environment sustainably. As part of their obligations under the Convention, state parties are expected to either alone or in cooperation with other states to take action to prevent, reduce and combat pollution of the coastal environment and ensure sound environmental management of natural resources.

In addition the following protocols have been adopted:

- Protocol Concerning Co-operation in Combating Marine Pollution in Cases of Emergency in the Eastern African Region, adopted in 1985
- Protocol Concerning Protected Areas and Wild Fauna and Flora in the Eastern African Region, adopted in 1985
- Protocol for the Protection of the Marine and Coastal Environment of the Western Indian Ocean from Land-Based Sources and Activities, adopted in 2010

Currently there are negotiations to adopt a Protocol on Integrated Coastal Zone Management.

The Convention and its Protocols provides a framework for the sustainable management of the Kenyan coast and thus justifies the work of LMMAs.

3.3 National legislation

i. The Environmental Management and Coordination Act

The Environmental Management and Coordination Act (EMCA) was adopted in 1999 and started being implemented as law in 2000. Before its enactment there was no coordination in the management of the environment. Every sector operated independently despite the clear link between different components of the environment. The Act provides a framework for coordination in the management of the environment through the National Environment Management Authority (NEMA). It underscores the need for integration in the management of the environment and its components. This need for integration is evident within the marine environment, where several agencies have responsibility. The Draft Integrated Coastal Zone Management Policy of 2014 captured this status in the following manner:

“The main challenge in managing coastal resources and its environment is the existence of multiple jurisdictions with a stake in the area. This makes coastal zone management a secondary responsibility of most jurisdictions, but a primary responsibility of none.”

This is the rationale behind the framework under the Environmental Management and Coordination Act. The Act creates the National Environmental Management Authority with two primary aims:

- Supervise and coordinate all aspects of environmental matters
- Act as the principal agency for implementing all government policies on the environment.

The Act elaborates tools and procedures to enable NEMA to carry out the above task. Sections 58-67, for example, has provisions for Environmental Impact Assessment (EIA), monitoring and audit, provisions which are useful for conserving the marine environment.

Section 50 of the Act is also aligned towards the conservation of marine and fisheries areas. It gives NEMA the authority, in consultation with other agencies, to *inter alia*: (a) identify, prepare and maintain an inventory of biological diversity in Kenya (b) determine which components of biological diversity are endangered, rare or threatened with extinction (c) identify potential threats to biological diversity and devise measures to remove or arrest their effects (d) undertake measures so as to integrate conservation and the sustainable utilisation ethic in relation to biological diversity in existing government activities or private activities.

Section 42, 54 and 55 are the most relevant sections of EMCA to the conservation of the marine environment and hence to LMMAs. First, Section 42 governs the protection of rivers, lakes and wetlands. It restricts the carrying out of certain activities in these ecosystems without an EIA being undertaken, and subsequently an approval by the Director General of NEMA being granted. Section 42(2) then empowers the Minister to declare any part of, amongst others, a coastal zone to be a protected area. In doing so the Minister is required to consider:

- The geographical size of the lake shore, wetland, coastal zone or river bank
- The interests of the communities’ resident around the lake shore, wetland, coastal zone or river bank concerned.

Having declared it a protected area and considered the above factors, the Minister can issue regulations or standards for the management of a coastal zone, which regulations one can argue could incorporate the involvement of local communities in the conservation of the coastal zone.

Section 54 also empowers the Minister, in consultation with the relevant lead agency, to declare an area to be a protected area. Section 54 gives the Minister the power to declare any part of land or sea as an environmentally significant area. The purpose of such declaration is to “promote and preserve specific ecological processes, natural environment systems, natural beauty or species of indigenous wildlife or the preservation of biological diversity in general.”

The other section that is relevant to LMMAs under EMCA is Section 55. Section 55 (1) and (6) give the Minister power to declare an area to be a protected coastal zone and thereafter formulate appropriate regulations to help prevent environmental damage in these areas. These provisions are relevant for declaration of an area as a protected area. To apply to LMMAs though, it would require that the communities liaise with the Minister before the declaration is undertaken or that regulations be developed under Section 55(6) which would provide clear procedure for community involvement in establishment of LMMAs and link with the Minister’s powers to declare such protected areas to ensure the conserved areas are community-led and not government-led.

The other relevant provision of EMCA is Section 55(2), which gives NEMA the authority to prepare an integrated coastal zone management plan. It states as follows:

“As soon as practicable upon the commencement of this Act, the Authority shall, in consultation with the relevant lead agencies, prepare a survey of the coastal zone and prepare an integrated national coastal zone management plan based on the report.”

The Survey report is expected to contain several details including:

- 1) An inventory of all structures, roads, excavations, harbours, outfalls, dumping sites and other works located in the coastal zone;
- 2) An inventory of the state of the coral reefs, mangroves and marshes found within the coastal zone;
- 3) An inventory of all areas within the coastal zone of scenic value or of value for recreational and cultural purposes;
- 4) An inventory of the areas within the coastal zone of special value for research in respect of fisheries, erosion, littorals movement and such similar subjects.
- 5) An estimate of the quantities of sand, coral seashells and other substances being removed from the coastal zone;
- 6) An estimate of the impacts of erosion on the coastal zone; and
- 7) An estimate of the extent, nature, cause and sources of coastal pollution and degradation of such survey.
- 8) An estimate of fresh water resources available in the coastal zone; and

9) Any other relevant data or information that may be deemed appropriate.”

In reliance of the above provisions, NEMA produced the first Integrated Coastal Zone Management (ICZM) Plan for Kenya in 2011 for the period for 2011-2015. Both the Plan and the draft ICZM policy support the involvement of communities in managing coastal resources and thus provide policy justification for LMMAs. The ICZM draft Policy of 2014, for example, under community empowerment and sustainable livelihoods, promises that the Government shall “*strengthen mechanisms for co-management, rehabilitation of coastal ecosystems, and sharing of benefits.*”

EMCA also recognises the importance of public participation. Section 3 recognises the principle of sustainable development and provides that an important aspect of that principle is participation of the people. It also provides for the application of cultural and social principles traditionally applied by communities in managing the environment and natural resources.

While EMCA has provisions that are useful for LMMAs, several challenges have, however, arisen from the provisions of this Act. One of these relates to the provisions of Section 55 which gives the Minister the authority to declare an area to be a protected coastal zone. This provision does not however specify either the conditions that should justify such protection and the numerical delimitation of such an area. This provision is thus seen not to offer much opportunity for protection due to its open-endedness and indeed has never been used for establishing LMMAs. The one instance where an attempt was made to establish a LMMA in reliance of the provisions of EMCA, the process was never concluded.

ii. The Wildlife Conservation and Management Act

Wildlife is an important natural resource found in several parts of the country. The Wildlife Conservation and Management Act was passed in 2013 and came into operation in 2014. It replaced the previous wildlife law and differs from that earlier one in two main respects. First it aligns the law to the provisions of the new Constitution. Secondly, and most importantly for LMMAs, it has more robust provisions for involvement of local communities in the management of wildlife resources and for wildlife conservation outside protected areas.

The Act defines wildlife as “*any wild and indigenous animal, plant or microorganism or parts thereof within its constituent habitat or ecosystem on land or in water, as well as species that have been introduced into or established in Kenya.*” From the definition, wildlife extends to the marine environment and both animals and plants in the marine environment. This definition is extremely wide and is demonstrative of a pattern of most sectoral legislations being developed in recent years of being extremely broad in their focus, which unfortunately increases the possibilities of institutional conflicts.

The Act provides for the establishment of the Kenya Wildlife Service (KWS) to provide for overall protection, conservation, sustainable use and management of wildlife in Kenya. KWS's functions include the conservation and management of national parks, wildlife conservation areas and sanctuaries under its jurisdiction. This is the traditional power that KWS has had over the years to exercise management powers over protected areas. The creation of such protected areas is to be undertaken by the Cabinet Secretary in consultation with the National Land Commission. KWS also has the duty to develop mechanisms for sharing benefits with communities living in areas where wildlife is found. Benefit sharing is included as a key objective of wildlife management.

Section 18 and 19 of the new Act contain provisions that govern the establishment and operations of County Wildlife Conservation and Compensation Committees, whose provisions are geared towards aligning wildlife conservation to the devolved structures. The membership comprise representatives of relevant departments of the national government operating within the county, representatives of county governments, representatives of KWS as the Secretary and four members nominated by community wildlife associations operating in the area. This provision recognises community involvement in wildlife management through reference to community wildlife associations. The Functions of the County Wildlife Conservation and Compensation Committees include:

- Registration of an establishment of wildlife user rights
- oversee preparation and implementation of management plans on community and private land
- ensure benefits derived from use of wildlife resources are distributed equitably
- bring together all relevant stakeholders within the county to actively harness their participation in the planning and implementation of projects and programmes related to the protection, conservation and management of wildlife resources in the county
- review and make appropriate recommendations on ecosystem based management plans produced by KWS;
- participate at the county level in land use planning initiatives and in consultation with all relevant stakeholders with particular regard to critical wildlife habitats, corridors and dispersal areas for the better management and conservation of wildlife;
- monitor the implementation of management plans for any relevant national park in collaboration with the Service;
- develop and implement, in collaboration with community wildlife associations, mechanisms for mitigation of human wildlife conflict;
- review and recommend claims resulting from loss or damage caused by wildlife for payment of compensation;
- undertake education, extension services and public awareness.

The County Conservation and Compensation Committees clearly provide an avenue for community involvement in the management of wildlife resources. They also extend the conservation measures to areas outside those under public land, the traditional protected areas, to include community land and private land.

To enable conservation measures to be undertaken even outside government-led wildlife protected areas, the Wildlife Conservation and Management Act recognises conservancies and their roles. It defines conservancies as “land set aside by an individual landowner, body corporate, group of owners or a community for purposes of wildlife conservation.” The Act, therefore, recognises that as part of protecting wildlife you can either establish protected areas, sanctuaries or conservancies hence recognising community and private led initiatives for conserving wildlife resources. Section 5 of the Act on preparation and adoption of a National Wildlife Conservation and Management Strategy provides in similar terms as Aichi target 11 for “clear targets indicating projection in terms of specific

percentage of landscape and seascape to be brought under protected areas, conservancies and sanctuaries over the next five years.” By referring to seascape it clearly brings the marine environment within the purview of the Act and hence its relevance to LMMA establishment. This is further supported by the requirement under Section 5 that the Wildlife Strategy also has to address “*measures facilitating community-based natural resources management practices in wildlife conservation and management.*”

The Act also provides for the formulation of plans for wildlife management areas. In the 5th Schedule to the Act, there are detailed requirements that are to be met in the process of preparing such plans, including:

- Presentation of a brief statement of the wildlife management goals and objectives;
- Statement of the species covered by the plan;
- A report detailing the participation of neighbouring communities in the preparation of the plan; and
- A description of the anticipated benefits and beneficiaries.

This provision underscores the importance of involving communities in the formulation of management plans to ensure that they benefit from the resources within their areas.

Section 31, 32 and 36 of the Act sets a basis for declaration of protected areas by the Cabinet Secretary responsible for wildlife matters. These provisions can be relied on to establish a marine conservation area. In Section 31, the Cabinet Secretary is empowered, in consultation with a competent authority, to:

- declare an area to be a national park
- declare an area to be a marine protected area
- publish a management plan for national parks, marine protected areas and Service-managed wetlands;
- publish areas zoned to have wildlife conservation and management as their land use priority.

In undertaking any of the above tasks, the Cabinet Secretary must first establish that there has been public participation and secondly that the provisions of EMCA have been adhered with. No declaration will also happen unless the approval of the National Assembly has been sought and obtained.

Sections 32 and 36 have almost similar wordings, save that 32 deals with national parks while 36 deals with marine protected areas. In Section 32, the Cabinet Secretary has the powers to, on the recommendation of KWS and following consultation of the National Land Commission and approval of the National Assembly, declare an area to be a National Park. Subsection 2 then proceeds to provide that “notwithstanding the provisions of subsection (2), a marine protected area shall adopt a system of zoning that caters for multiple uses of marine resources for any or all of the following:

- Extraction or no extraction zones in respect of marine resources;
- Protection of nesting, breeding and foraging areas;

- No-take areas in respect of fisheries; and
- Areas that may be used by local vessels for passage;
- Any other purposes with respect to specified human activities within the zone.

This section has very little relevance to LMMAs as it focuses on national parks, whose control is largely with KWS, once established. However, similar wording is found in Section 36(3) which is more relevant to LMMAs. The provision of Section 36 is contained in the box below:

Section 36: Establishment of Marine Conservation Areas

(1) The Cabinet Secretary may, upon recommendation of the relevant county government after consultation with the relevant lead agencies, by notice in the Gazette, declare any marine area to be a marine conservation area where the area is:-

- (a) rich in biodiversity or harbours endangered and threatened marine species;
- or
- (b) a critical habitat for a variety of marine resources.

(2) A marine conservation area established under subsection (1) shall be managed by the relevant county government under an approved management plan prepared through a consultative process with the relevant lead agencies and communities.

(3) Notwithstanding the provisions of subsection (2), a marine conservation area shall adopt a system of zoning that caters for multiple use of marine resources for any or all of the following:

- (a) extraction or no extraction zones in respect of marine resources;
- (b) protection of nesting, breeding and foraging areas;
- (c) no take areas in respect of fisheries; and
- (d) any other purposes with respect to specified human activities within the zone.

(4) The Cabinet Secretary shall, on recommendation of the relevant county government, by notice in the Gazette, issue appropriate rules and regulations for effective management of marine conservation areas.

The above provisions vest the control of marine conservation areas in county governments. It is possible that the regulations to be developed can provide avenues for the involvement of communities in the management of the established marine conservation areas or for setting aside of certain portions of such marine areas as LMMAs for operation by communities.

Section 40: Community Wildlife Associations and Wildlife Managers

(1) Communities, landowners, groups of landowners and existing representative organisations may establish a community wildlife association and register under the appropriate law or in the case of an individual owner, may be registered as a recognised wildlife manager by the County Wildlife Conservation and Compensation Committee.

(2) The object and purpose for which an association is established is to facilitate conflict resolution and cooperative management of wildlife within a specified geographic region or sub-region.

The other relevant provision under the Act is Section 40. The Section empowers communities to create and register Community Wildlife Associations. These associations once registered can be involved in co-management of wildlife resources as evidenced in the provisions of Section 40 in the box below.

Community Wildlife Associations provide communities with a platform for engaging in conservation of wildlife resources. These provisions read together with those for the creation of Marine Conservation Areas can be adopted to operationalise the establishment of LMMAs, if their objective is wildlife conservation. The Wildlife Conservation and Management Act clearly has provisions that can be used to support the operations of LMMAs, the key consideration being that such LMMAs must have an objective that is restricted to wildlife conservation.

iii. Fisheries Act

The Fisheries Act was enacted in 1989 to provide for the development, management, exploitation, utilisation and conservation of fisheries. It has since been revised several times with the latest version having undergone a revision in 2012. Currently, there is a Fisheries Management and Development Bill that seeks to replace the current Fisheries Act. The Act is applicable to both marine and inland fisheries. The Act further contains Fisheries (General) Regulations and the Fisheries (Foreign Fishing Craft) Regulations which give effect to the provisions of the Act.

The Fisheries (General) Regulations contain 69 provisions on various issues including, inter alia, provision on prevention of pollution and protecting and conserving fishery waters. On the other hand, the Fisheries (Foreign Fishing Craft) Regulations have provisions to control fishing in Kenyan waters. From the foregoing, it can be seen that this Act seeks to regulate fishing activities.

One of the main aspects of the Act, relevant to LMMAs are the Fisheries (Beach Management Unit) Regulations of 2007. These regulations provide for the establishment of Beach Management Units (BMUs) as “an organisation of fishers, fish traders, boat owners, fish processors and other beach stakeholders who traditionally depend on fisheries activities for their livelihoods.” The Act gives the responsibility of creating BMUs to The Director of Fisheries. These are to be created for each landing station, although it is possible for a BMU to cover more than one landing station.

The objectives of BMUs are to:

- strengthen the management of fish-landing stations, fishery resources and the aquatic environment;
- support the sustainable development of the fisheries sector;
- help alleviate poverty and improve the health, welfare and livelihoods of the members through improved planning and resource management, good governance, democratic participation and self-reliance;
- recognise the various roles played by different sections of the community, including women, in the fisheries sector;
- ensure the achievement of high quality standards with regard to fish and fishery products;
- build capacity of the members for the effective management of fisheries in collaboration with other stakeholders; and
- prevent or reduce conflicts in the fisheries sector.

The Regulations provide that as part of the process of establishing BMUs, the Director will survey and demarcate the extent of the area of jurisdiction of a BMU. A provision within the regulations that has hitherto been relied on by the Director of Fisheries in establishing LMMAs is Regulation 7, which provides as follows:

(7(1) “The authorised fisheries officer shall, following a consultative process, designate at respect of each Beach Management Unit a Co-management area which shall be an area in which the Beach Management Unit shall undertake fisheries management activities jointly with the Director.”

Following the designation, the Director of Fisheries in consultation with members of the BMU develops a co-management plan which details the management measures to be undertaken within the co-management area to ensure sustainable fisheries. Measures to be undertaken include:

- The designation of closed areas in which all fishing activities or specified fishing activities are prohibited;
- The designation of closed seasons either throughout the Co-management area or in respect of specified areas;
- The marking of fishing vessels;
- Restrictions on the type of nets or other fishing gears that may be used; and
- Restrictions on the number of fishing vessel licences or fishing licences that may be issued.

These Regulations have been the most extensively used in the creation of marine LMMAs in Kenya. The State Department of Fisheries (SDF) has also been the most supportive government department in LMMA establishment. However, the Act is focused on fisheries, while LMMAs sometimes undertake management measures that focus on other resources outside fisheries. The Fisheries Management and Development Bill defines fisheries resources to include the fishery’s stock species and their habitats. Its objectives include

conservation of all fishery waters and habitat. It is much more expansive in focus than the current Fisheries Act. In addition the Government is developing a new Oceans and Fisheries Policy, which would provide an opportunity for policy recognition of the experience over the years with LMMAs as an arrangement for conservation of fisheries resources.

iv. Forests Act

The Act was adopted in 2005 and replaced the earlier Forest Act. One driving impetus for its passage was the need to capture much more clearly the need for the involvement of local communities in the management of forests through the concept of participatory forest management. It defines forests to include “any land containing a vegetation association dominated by trees of any size, whether exploitable or not, capable of producing wood or other products, potentially capable of influencing climate, exercising an influence on the soil, water regime, and providing habitat for wildlife, and includes woodlands.” The definition of forests includes mangroves, which are a category of indigenous forests found along the shoreline in brackish or salty water.

Section 40 (1) (h) further states that indigenous forests shall be managed on a sustainable basis as habitat for wildlife in terrestrial forests and fisheries in mangrove forests. This links mangroves to fisheries resources and also brings mangroves within the purview of the management objectives of LMMAs.

Community participation is recognised as a key element of the conservation of forests. Section 45 provides for establishment of Community Forest Associations and their registration by the Director to participate in the management of a forest. The manner in which communities can apply to participate in the management of these areas has also been outlined in this section. This provides opportunities for communities to form associations to manage mangrove forest areas at the coast. In addition there are detailed Forest (Participation in Forest Management) Rules of 2009 and Participatory Forest Management Guidelines issued by the Kenya Forest Service which provide a clear guide to communities that desire to engage in the management of forest resources. These are useful not just to the co-management of mangroves but also generally as a best-practice guide to the process of developing guidelines for LMMAs.

v. County Government Act

The County Government Act was assented into law on 24th July 2012 and provides for the operationalisation of chapter eleven of the Constitution that deals with Devolution. It details the powers and functions of county governments and their responsibilities to deliver services. Counties have fourteen functions as listed in the Fourth Schedule of the Constitution. Amongst these functions is that of “implementation of specific national government policies on natural resources and environmental conservation.” In addition, counties have the responsibility of ensuring and coordinating the participation of communities in governance at the local level. As part of this they can assist communities and also develop their administrative capacity. Every County has both a legislative and executive organ. The executive arm is headed by a Governor, who once elected appoints County executive members to work with the Governor in running the County. Every County has a County Executive Committee member with responsibility for environment and natural resource management.

The County Government Act, though not addressing LMMAs directly, has provisions that can be utilised to link LMMAs to counties. The success of LMMAs as entities for enabling local communities to participate in the management of natural resources link very well with

the overall mandate given to counties and provide a practical avenue to supporting one of the objectives of devolution which focuses on community involvement in local governance.

vi. Land Act

The Land Act was passed in 2012 and consolidates the laws dealing with sustainable administration and management of land and land-based resources. Based on the definition of land under the Constitution, the principles and guidelines of the Act are relevant. Section 10 dealing with conservation of ecologically sensitive public land is particularly relevant to LMMAs and could give the National Land Commission the powers to engage in LMMAs.

Section 10 Land Act

- 1) The National Land Commission shall take appropriate action to maintain public land that has endangered or endemic species of flora and fauna, critical habitats or protected areas.
- (2) The National Land Commission shall identify ecologically sensitive areas that are within public lands and demarcate or take any other justified action on those areas and act to prevent environmental degradation and climate change.
- (3) Notwithstanding subsection (2) the National Land Commission shall consult existing institutions dealing with conservation.

Section 10 provides that the National Land Commission is established by the Constitution and vested with the responsibility of managing public land on behalf of the national and county government, and through them, managing on behalf of the people of Kenya.

vii. The Survey Act

The Survey Act addresses issues relating to surveys and geographical names and the licensing of land surveyors. The Act details the process of carrying out surveys and placing boundary marks on land. Detailed Regulations have been made under the Act to govern certain aspects of the survey process. The Survey Regulations adopted in 1994 have two regulations that are relevant to the discussions on LMMAs. These relate to the extent of LMMAs. First is the provision of Regulation 110, which provides that:

Where unalienated Government land fronting on the area coast is being surveyed for alienation, a strip of land not less than 60 metres in width shall normally be reserved above high-water mark for Government purposes...

...Provided that, if the interests of development require, the Minister may direct that the width of this reservation shall be less than 60 metres in special cases.

Similarly if the land is a lake then Rule 112 requires that the reserved land be not less than 30 metres above the High Water Mark. A similar provision exists for rivers at rule 111. The Regulations defines the High Water Mark as the Mean High Water Mark of Spring tides. It is clear from the Survey Act that the distance from the High Water Mark is either 30 metres or 60 metres depending on whether it is sea or a lake. From this Act, therefore, the LMMA area within the coast can extend to 60 metres above the high water mark.

3. Legislative Guidelines for LMMAs

3.1 Why legislative guidelines?

The developments of these legislative guidelines seek to fill a gap in the development and operations of LMMAs in Kenya. Coral reef based LMMAs were introduced in Kenya by the East African Wildlife Society, an East African non-government organisation (NGO), largely in partnership with Flora and Fauna International (FFI), to provide an avenue for communities to be involved in the management of marine resources and the marine environment. Since then their numbers and adoption by communities have grown exponentially. The development started at a time in the country when awareness on the limits of top-down state-centered natural resource management approaches started being fully appreciated. Communities increasingly started making a case for their involvement in the management of natural resources. This led to the adoption of co-management as a concept in several natural resource sectors.

Co-management is a management approach which involves close collaboration between government, local communities and other relevant stakeholders (e.g. private sector, civil society) in the management process. It involves sharing of responsibilities in the management process of an area or natural resource based on negotiations and agreements. It focuses on improving the success of management efforts so as to make the achievement of the aims attainable in a sustainable manner. The aim is usually environmental conservation, sustainable resource use and equitable sharing of benefits. Co-management has been applied in many natural resource sectors and included in legislations and policies governing these sectors as evidenced by inclusion of Community Forest Associations and participatory forest management in the Forest Act; Beach Management Units and co-management in the Fisheries Act; and Water Resource Users Associations in the Water Act.

The introduction of LMMAs followed the modern approach in conservation of marine areas and resources, which focused on establishment of marine protected areas and no-take zones. However, there was the contestation that marine protected areas focused largely on conservation, often ignoring the reliance by local communities on those resources for their existence. To correct this bias, LMMAs have sought to balance conservation and sustainable livelihoods and taken these two as their dual rationale and goals.

Although there has been an increase in the numbers of LMMAs and their acceptance in the coastal region of Kenya, there is still conceptual confusion on what they mean and their status in law. While the process of their creation has received government support through the State Department of Fisheries, the lack of explicit mention in a specific legislation has resulted in confusion on their legal base and status. Several laws have provisions that seem to support their existence. However, none wholly speaks to the practical realities in the establishment and operation process. This opens up room for either weak legal

anchorage and support or institutional turf wars on responsibility from Government for support to and collaboration with LMMAs.

Other legal challenges include lack of tenure security for local community members, sectoral approach to conservation and overlapping mandates of institutions responsible for conservation particularly the administrative authorities for fisheries, wildlife protection and forestry. Amongst the communities themselves, there have also been disagreements when it comes to the manner in which the protected areas for conservation are to be established. This is exacerbated by lack of clarity in the procedure to be followed in the establishment of LMMAs sometimes resulting in lack of adequate consultation and involvement of the community members.

As a result of the legal lacuna, this report proposes the adoption of guidelines to help provide legislative clarity by avoiding continued multiple avenues for establishment and legislative anchorage for LMMAs. Secondly guidelines are preferred for their non-mandatory form allowing for organic evolution, promotion of collaboration amongst relevant government agencies and providing a framework for choice making by communities to make a voluntary choice, collaboration amongst government agencies and structured engagement between government and communities in managing marine resources.

Clearly, it is important that LMMAs have some guidelines or a legislative framework to support their establishment and operations. Key things to include in such guidelines or legislation include:

- The objectives of the legislation;
- Management rules and penalties to be applied for violation;
- Delineation of boundaries;
- providing adequate statements of authority;
- Precedence and procedures;
- Advisory and consultation process;
- Criteria for decision-making;
- Relationship with other national and local authorities;
- Management plans,
- Zoning and regulation;
- Monitoring and review; and
- Compensation.

One of the most important considerations in developing the guidelines or legislative framework is the issue of public participation. It is important that the people to be affected

by the guidelines be consulted and involved in the discussions and adoption of the guidelines. Education and public awareness will also be necessary so as to enable the persons to be affected by the legislation know their rights and responsibilities under the legislation.

Due to the various interests that underpin marine environment conservation, it is important that all the stakeholders should be involved in coming up with the legislation. Of particular importance is the need to involve those using the neighboring ocean areas because of the inter-connected nature of the sea in which actions in one area impinge on the other areas. The involvement of these groups in coming up with the legislation to cater for these areas will also increase the levels of acceptability of these initiatives among these groups.

3.2 Legislative guidelines

The following guidelines comprise 18 recommendations, clarifications or definitions that we propose to help clarify the legal framework for the establishment and operations of LMMAs in Kenya. They are based on the existing legal frameworks in Kenya, including international treaties and conventions to which Kenya is a party. They are a guide both to communities and government agencies that will be involved in the establishment and operations of LMMAs in Kenya. The term LMMA is used here to refer to the full range of community established conservation areas as listed in Annex I and can be used interchangeably with Community Conservation Area (CCA) or tengefu.

- i As used in the Kenyan context, while there is no single legislation defining marine community conservation areas, they are the equivalent of the internationally recognised Locally Managed Marine Areas (LMMAs). They are a generic term and refer to an area set aside in coastal waters for conservation and management activities by local communities in collaboration with relevant government agencies. This clarifies that LMMAs are not an institution but an approach that involves setting aside an area in coastal waters for purposes of marine conservation. By these guidelines, the term Locally Managed Marine Area is adopted as the operational term to refer to areas of the sea set aside for local-community led management initiatives.
- ii While legal registration is not a prerequisite for commencing the process of establishment of LMMAs by communities, the finalisation of the process should involve determining the legal form under which the Community will operate. The option of what form or legal status a Community can be registered for the purpose of operating a LMMA will be left entirely to the discretion of the community members and based on the anchoring legislation. As this legal review has demonstrated, there are several legal forms ranging from associations, BMUs, CFAs and Community Wildlife Associations that can be considered as options.
- iii Groups of people who have constituted themselves for purposes of using and/or conserving the sea, land and any component of the marine environment including fisher's communities, traders, farmers, local community organisations can be recognised for purposes of operating a LMMA. Current examples exist in the form of BMUs.

iv Membership to groups establishing and operating a LMMA should be inclusive of different interest and stakeholders within the local community including fisher folk, traders, farmers, private sector, environmental groups and community based organisations.

v The coverage of the LMMAs shall include a designated part of the sea and may extend as high as sixty meters (60) above the Mean High Water Spring mark (MHWS) on the beach. The delineation process will be undertaken through a consultative process involving local communities and government agencies responsible for the conservation of the marine environment. Further the delineation process should be based on scientific research information and advice.

vi There exists numerous government agencies and legislation that have relevance for conservation of the marine environment and creation of LMMAs. While the Fisheries Act and the State Department of Fisheries (SDF) have been at the forefront in establishing LMMAs at the coast, the reliance on that legislation and approach is mainly relevant if the focus is fisheries management. The experience with LMMAs point to the relevance of several pieces of legislation including the Wildlife Conservation and Management Act, The Fisheries Act, The Environmental Management and Conservation Act and the Forest Act. Consequently the operations of LMMAs could draw from the provisions of any these four pieces of legislation. It is recommended that they be anchored on one depending on the main objective sought to be pursued by the LMMA.

vii The Community should at their initial consultations processes clarify what is the primary objective of the LMMA, and this will help determine the Government agencies to collaborate with in the operations of the LMMA once established.

viii In establishing LMMAs communities should consult and receive recognition from relevant government agencies in the process of establishing the LMMA.

ix Based on clearly set objectives and in consultation with relevant agencies the community should develop a management plan, including no-take zones for conserving the marine environment within the LMMA. Broad objectives of LMMAs should capture sustainable resource use; promotion of alternative sources of revenue; improvements of livelihoods; and conservation of marine resources.

x Government agencies should establish inter-agency committees at the coast and sign MoUs to clearly stipulate a coordinating mechanism to support communities in the establishment and operations of LMMAs.

xi The coordinating mechanism should designate the focal government agency that the local community desirous of establishing a LMMA should approach and which will have the duty of bringing on board the other relevant government agencies.

xii The process of establishing LMMAs should also involve consultations with NEMA as the legislative body charged with Integrated Coastal Zone Management. NEMA should then ensure that where the objectives to be pursued are beyond the mandate of one lead agency, then all relevant agencies are brought on board so

as to collaborate with and support the community in achieving the objectives it has set for the LMMA.

xiii County governments, through the relevant County Executive Committee should be consulted in the process of establishing LMMAs to ensure their involvement and support to the LMMA once operational. This should culminate in the recognition of LMMAs by the County Government.

xiv County Governments should factor LMMAs and their operations into their integrated development plan and budgeting process. Function 14 of the Fourth Schedule of the Constitution mandates County Governments to ensure and coordinate the participation of local communities in governance. LMMAs are a critical tool in actualising these frameworks.

xv The formation of LMMAs should seek to involve and represent the different stakeholders within the local communities including fisher folk, traders, farmers, private sector, environmental groups and community based organizations. It should not, however, be about formation of new rival institutions. Wide and objective consultation is at the heart of success of LMMAs. In addition efforts should be geared towards linking with and building on existing local community institutions.

xvi Every community should develop regulations to govern the operations of the LMMA, and set out management objectives, relevant procedures and rights and obligations of the community members and the larger public.

xvii Every LMMA should put in place internal mechanisms for resolving any disputes that may arise in the operations of the LMMA. Formal methods of dispute resolution should be relied on only after exhaustion of internal mechanisms.

xviii LMMAs should enter into partnerships with the private sector and civil society for capacity building, training and financial support for operations and sustainability purposes.

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Annex One: Generic and legal names used for LMMAs in Kenya

Generic terms	Legal Names	Legislation	Agency
Locally Managed Marine Area (LMMA)	Co-management area	Fisheries Act Cap 378; Fisheries (Beach Management Unit) regulations 2007	State Department of Fisheries (SDF)
Community Conservation Area (CCA)			
<i>Tengefu Kiswahili vilindo vya wenyeji</i> (Kiswahili)	Sanctuary Marine Protected Area Wildlife Conservancy	Wildlife Management and Conservation Act 2013	Kenya Wildlife Service (KWS)
Community reserves			
Community conservancies	Protected coastal zone	Environmental Management and Coordination Act 1999	National Environment Management Authority (NEMA)
Indigenous Protected Areas			
Biocultural heritage sites			

Annexe Two: Government Officials Consulted

1. Susan Imende - Acting Director of Fisheries, State Department of Fisheries
2. Faith Pesa - Legal Officer, Ministry of Environment, Water and Natural Resources
3. T Ogola - Legal Officer, Kenya Wildlife Resources
4. S Katua - Deputy Director Coastal Marine and Freshwaters Department, NEMA
5. Irene Kamunge - Director Legal Services, NEMA

The discussions with the government officials focused on their mandates in relation to the conservation of the marine environment, experience engaging with communities and lessons to be learned from that experience. The second component of the consultation focused on LMMAs to assess the extent to which the Government agencies were aware of the establishment and management of LMMAs in Kenya. Lastly each official then discussed the broad draft recommendations and provided inputs and perspectives on the best ways for giving legislative anchorage for LMMAs.

The key outcome of those recommendations was the consensus that the State Department of Fisheries (SDF) had the most experience with LMMA establishment at the Kenyan Coast. Despite this, the Wildlife (Conservation and Management) Act, 2013, the Environmental Management and Coordination Act (EMCA) and Forests Act have provisions relevant to LMMAs establishment. The Government agencies suggested the need for greater collaboration amongst relevant agencies so as to ensure harmony. The suggestion for the inter-agency collaboration is one that will build on the traction already realised from the leadership role of SDF while bringing in other institutions like NEMA in its coordinating role.