



RECONCILE

# Energy Governance

*In Kenya energy is a vital resources on the socio economic development such as fuel industry, commerce, transportation and agriculture. In achieving the aspiration of Vision 2030 Kenya's energy sector aspires to provide affordable, sustainable and reliable supply of energy that will stimulate high and sustained economic growth leading to higher incomes, increased employment and reduced poverty. The main sources of energy in Kenya include; wood fuel, petroleum and electricity as well as renewable energy. The major sources of electricity are hydropower, geothermal and thermal while petroleum energy is exclusively imported and is mainly used in transport, commercial and industrial sectors. Biomass energy and wood fuel has been the most important energy in Kenya mostly in the rural and urban households' energy requirement. Alternative sources of energy include solar energy, windmills, power alcohol and biogas.*

Institutions established by **Energy Bill, 2015**: Energy Regulatory Authority, Energy and Petroleum Tribunal, Rural Electrification and Renewable Energy Corporation, Energy and Petroleum Institute e.t.c

The reform process safeguarding energy resources has been long overdue. Focus in the past has been on the electricity and petroleum sub-sectors. The Sessional Paper No. 10 of 1965 dwelt on Electric Power Act (Cap 314) used to regulate the sector. It was followed by Sessional Paper No. 1 of 1986 which however did not focus much on the power sector. The Paper called for establishment of the Department of Price and Monopoly Control within the Ministry of Finance to monitor action in restraint of trade and to enforce pricing in the various sectors. In 1981 the National Oil Corporation of Kenya Limited (NOCK) was established by the government and incorporated under the

Companies Act. The company's main objective then was to coordinate oil exploration activities. The Petroleum Act (Cap 116) for a long time was used to guide operations in the sector. In addition to this legislation there was the Petroleum (Exploration and Production) Act (cap 308) that was enacted in 1984 later revised in 1986. Through this NOCK was mandated to oversee oil exploration in the country.

The energy sector witnessed developments which saw the unbundling of the Kenya Power and Lighting Company with enactment of the Electric Power Act No. 1997; Kenya Power and Lighting Company that was to carry out transmission and distribution functions, the

KenGen to carry out the generation function and the Electricity Regulatory Board to regulate the power sector. The Act also aimed at facilitating private sector participation in the provisions of electricity services. In 2004 the Ministry of Energy in consultation with stakeholders developed the Sessional Paper No. 4 of 2004 objectives included; provide sustainable quality energy services for development; utilize energy as a tool to accelerate economic empowerment for urban and rural development e.t.c Following the Sessional Paper, the Energy Act No. 12 of 2006 was enacted. It converted ERB to ERC to offer regulatory stewardship to electricity, petroleum and new and renewable sub-sectors, Rural Electrification Authority (REA) and Energy Tribunal.

The Energy Act, 2006 was to regulate the energy sector particularly the generation, transmission, sale of electrical energy & petroleum products and importation and renewable and nonrenewable. It consolidated Electricity Power Act, 1997 and Petroleum Act but it does not deal with upstream petroleum as that is dealt with under the Petroleum (Exploration and Production) Act Chapter 308. The government has created two other key institutions; the Geothermal Development Company and Kenya Electricity Transmission Company (KETRACO). All these initiatives are aimed at ensuring security of energy in the country in order to meet increased energy demand as envisaged in vision 2030. The national government is now in the tail end of reviewing the Energy Policy being guided by Sessional Paper No. 4 of 2004, the Mining Act 2006, the Energy Act 2006 and the Petroleum (Exploration and Production) Act 1986 and formulating the Natural Resources Management Policy.

The State has also come up with a Community Land Bill, 2015 to address issues of community land ownership. These proposed policy and

legal frameworks seek to generally regulate the relationship between the government and investor, and provide a better business environment for the industry in Kenya. We have the National Energy and Petroleum Policy, 2015 organized into nine chapters; the Introduction, Petroleum and Coal, Renewable Energy, electricity generation from geothermal and hydro resources, Electricity, Energy Efficiency and Conservation, Land, Environment, Health and Safety, Devolution and Provision of Energy Services; Energy Financing, Pricing and Socio-Economic Issues; and Cross Cutting Issues, respectively. The objectives of the policy framework is to ensure affordable, competitive, sustainable and reliable supply of energy to meet national and county development needs at least cost, while protecting and conserving environment.

Following the policy there is the Energy Bill, 2015 whose objectives are; to consolidate the laws relating to energy, to provide for National and County Government functions in relation to energy, to provide for the establishment, powers and functions of the energy sector entities; promotion of renewable energy; exploration, recovery and commercial utilization of geothermal energy; regulation of midstream and downstream petroleum and coal activities; regulation, production, supply and use of electricity and other energy forms. The Bill envisions repealing; Energy Act, 2006 and Geothermal Resources Act. Additionally there is the change of structures which is as follows; Energy Regulatory Commission will now be the Energy Regulatory Authority; Energy Tribunal will now be Energy and Petroleum Tribunal; Rural Electrification Authority will be Rural Electrification and Renewable Energy; and the Kenya Nuclear Electricity Board will be the Energy and Petroleum Institute.

With the reform process on legislation in place, there is need to note unto which the energy

resources will be managed and administered. The National Government has exclusive jurisdiction in exploitation & exploration of natural resources in the management and control of natural resources. When minerals and mineral oil are discovered, the land is categorized as public land this is under article 62 (1) (f) Constitution. Further article 62(3) expressly provides that land where minerals and mineral oil are found will vest in and be held by the national government in trust for the people of Kenya and will be administered on their behalf by the National Land Commission. All this provides that energy resources-minerals is to be under the National Government and not necessarily a shared function as per the fourth schedule of the Constitution let alone the fact that the distributed functions are not clear as in the Constitution.

Compulsory acquisition also expresses the same that energy resources-minerals are under the National Government. Article 40 of Constitution binds the state not to enact any legislation that arbitrarily deprives a person of his land or interest in land. In event that the government is to compulsorily acquire private or community land then the holders of such interest are entitled to a prompt, full and just compensation. Once again after the compulsory acquisition process is done the land becomes public land thus falling under article 62(3). It ought to be noted that in as much as article 67 has indicated that public land vests to the National and County government, article 62 has categorized the distribution of such land, article 62(2) and 62(3). With the policy framework in place, devolution has to be acknowledged article 6 and 174 of the Constitution.

Although the Energy sector in Kenya falls under the Ministry of Energy article 6(2) recognizes that the National and County governments are distinct and inter-dependent and they need to conduct their mutual relations on the basis of

consultation and cooperation. Article 189 mandates the governments at either level to;

- a) Perform its functions, and exercise its powers, in a manner that respects the functional and institutional integrity of government at the other level, and respects the constitutional status and institutions of government at the other level and, in the case of county government, within the county level.
- b) Assist, support and consult and, as appropriate, implement the legislation of the other level of government; and,
- c) Liaise with government at the other level for the purpose of exchanging information, coordinating policies and administration and enhancing capacity.

The governments in cooperating in the performance of functions and exercise of powers may set up joint committees and joint authorities. The Intergovernmental Relations Act sets out the principles of Intergovernmental Relations, which are to apply to the national and county governments; intergovernmental relations structures established by law and the dispute resolution mechanisms provided under the Act. Subject to devolution and the Intergovernmental Relations Act, the Constitution in the Fourth Schedule Part I and Part II has provided for distribution of functions as follows;

- ❖ National Government; foreign affairs, foreign policy and international trade; national economic policy and planning; intellectual property rights transport and communications; national statistics and data on population, the economy and society; general principles of land planning and the co-ordination of planning by the counties; protection of the environment and natural resources with a view to establishing a durable and sustainable system of development including- water protection, securing sufficient residual water, hydraulic engineering and the safety of dams; and

energy policy; National referral health facilities; Disaster management; Health policy; Energy policy including electricity and gas reticulation and energy regulation; Capacity building and technical assistance to the counties; National betting, casinos and other forms of gambling.

- ❖ County Government; statistics, land survey and mapping; boundaries and fencing; housing and electricity and gas reticulation and energy regulation; trade development and regulation; control of pollution; county transport; and implementation of specific national government policies on natural resources and environmental conservation.

The main aim of adopting devolution was to -

involve people in governance, allowing for better supervision and implementation of policies at the grass root level although article 191 stipulates that in case of any conflict, the national legislation prevails over county legislation. On the contrary article 66(2) places an obligation upon the State to enact legislation to ensure that investment in property is to benefit local community and their economies. The Energy Bill, 2015 thus deemed it fit to incorporate provisions for regulating the manner in which counties are to relate with the national government in the industry under the fifth schedule. The fifth Schedule under the Energy Bill, 2015 is a mode of remedying the incomplete interpretation under the fourth Schedule under the Constitution.

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