

Local agricultural production in Kenya: legal framework, obstacles and challenges

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A: INTRODUCTION

Agriculture sector in Kenya is the fundamental part of the economy contributing 25 percent of the total Gross Domestic Product (GDP), and another 27 percent indirectly.¹ The sector employs over 40 percent of the total population and over 70 percent of the rural people. In Kenya, the agricultural sector is large and complex, with a multitude of public corporations, non-governmental and private actors. It accounts for 65 percent of the export earnings and provides livelihood (employment, income, and food security needs) for more than 80 percent of the Kenyan population.²

As with any system the agricultural sector in Kenya is governed by extensive regulatory framework that provides guidance to the whole system. These include policies, laws and regulations. The sector is regulated broadly by the Constitution of Kenya as well as regional and international instruments. The biggest challenge, however, is how effectively these regulatory instruments are implemented.³ The good performance the agricultural sector ensures good performance of the entire economy. Therefore the policy and institutional frameworks governing the agricultural sector play a vital role for the development of the whole economy.⁴ As a result, since 2003, there been much activity in an attempt to revitalize Kenyan agriculture and this has been undertaken through a number of regulatory and institutional reforms as will be seen from the analysis of the legal framework below.

B: LEGAL FRAMEWORK

I. The Constitution

Kenya promulgated the new constitution in 2010 which proposes two levels of governments (national & county) with defined functions. Agriculture is one of the devolved governance functions. The Constitution is the foundation of public policies and legislation at the nation-

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1 <http://www.fao.org/3/a-au719e> > accessed 11 November 2020.

2 World Bank, 2019.

3 Ayenew & Arquitt. Kenya agricultural performance and targets: scenarios and implications. Changing Course in Global Agriculture (CCGA) Policy Brief No. 2.2018.

4 https://ke.boell.org/sites/default/files/uploads/2013/08/how_the_new_agricultural_policy_and_legislative_framework_would_impact_on_value_chain_actors.> accessed 11 November 2020.

nal and county levels. The Constitution also spells out strongly the participation of the public in policy and legislation development. Article 2 of the Constitution provides that treaties ratified by Kenya are part of the law of Kenya. This means that international instruments touching on agriculture have legal effect in Kenya.

County governments are required by the Constitution to implement national public policies and legislation by Article 183 (b) and (d). The Constitution also provides for a framework to ensure that each county government receives an equitable share of the national budget and is able to prioritize expenditure. County planning is done through County Integrated Development Plan which is a requirement by section 108 of the County Governments Act. Since agricultural activities are mostly undertaken with rural Kenya and within the counties, this provides a good opportunity for agricultural development. However county governments are at divergent levels at customizing important national policies and legislation for local agricultural production. Important to note is that the Constitution assures Kenyans of the right to be free from hunger and to have adequate food of acceptable quality (Article 43(c).⁵To achieve this, the government must direct adequate resources towards food production.

II. WTO Agreement on Agriculture

The intent of the WTO Agreement on Agriculture is elimination of export subsidies, development issues of low developed countries. Some of the commitments to the Agreement constrain the policy space for local production in Kenya due to tariff commitments.⁶ Kenya has inadequate capacity in negotiations and implementation of the Agreements. Kenya's participation in the WTO has raised the importance of trade which has now been incorporated into our national development strategy; through adoption of the National Trade Policy and the enactment of the Trade Remedies Act. Trade facilitation Agreement has also been implemented helping in lowering the cost of doing business.⁷

III. Comprehensive Africa Agriculture Development Programme (CAADP)

This programme aims at increasing agricultural growth rates through extending the area under sustainable land management and reliable water control systems, facilitating market access, increasing food supply and improving research and extension. In Kenya, CAADP is implemented through the Agricultural Sector Development Strategy.

5 Article 43, the Constitution of Kenya, 2010.

6 http://www.fao.org/fileadmin/templates/fapda/Kenya-Policy_Report.> accessed 11 November 2020.

7 Ibid.

IV. The Sessional Paper Number 10 of 2012 on the Kenya Vision 2030

Kenya adopted Vision 2030 in 2008 as a new blue print and roadmap for political, social and economic development of the country in the next two decades. The Vision also identifies agriculture as the engine of growth through transformation of smallholder and subsistence agriculture to innovatively and commercially oriented agriculture.⁸

In the Vision, agriculture is identified as a key sector in achieving the envisaged annual economic growth rate.⁹ This shall be achieved through transformation of smallholder agriculture from subsistence to an innovative, commercially-oriented and modern agricultural sector.¹⁰ This sessional paper identifies specific interventions which in the agricultural sector include increasing productivity of crops and livestock, introducing land use polices for better utilization of high and medium potential lands, developing more irrigable areas in arid and semi-arid lands for both crops and livestock, and improving market access for smallholders through better post-harvest and supply chain management.

The shortcomings of this Vision include: smallholder land-tenure interests are covered but by default as there is no special attention for this issue; the issues of sustainability of land as a natural resource, biodiversity conservation, organic farming and farm energy are not addressed, unless under the broad principle of “sustainable development”; family farming as a facilitator for smallholder performance is not mentioned and the specific good environmental conservation practices that warrant rewards are not clarified.

V. Crops Act

An Act of Parliament that consolidated and repealed various statutes relating to crops and provide for the growth and development of agricultural crops and for connected purposes.¹¹ This Act seeks to accelerate the growth and development of agriculture, enhance productivity and incomes of farmers and the rural population, improve investment climate and efficiency of agribusiness and develop agricultural crops as export crops. The Act promotes the production, processing, marketing, and distribution of crops in suitable areas. It also introduces, among other things, the following measures including: (i) reduction and circumvention of unnecessary regulatory bureaucracy in the crops subsector; (ii) reduction of unnecessary levies, taxes or other barriers to free movement of crop products and provide for a rationalized taxation system; (iii) promotion of competitiveness in the crops subsector and development of diversified crop products and market outlets; and (iv) attracting and promoting private investment in crop agriculture.

8 http://www.fao.org/fileadmin/templates/fapda/Kenya-Policy_Report.> accessed 11 November 2020.

9 Ibid.

10 Ibid.

11 Section 2, the Crops Act, 2013.

This Act applies to all scheduled crops specified in the First Schedule and to all agricultural land whether privately or communally held. The Act sets out functions of the Agriculture, Fisheries and Food Authority established under the Agriculture, Fisheries and Food Authority Act, 2013, and county governments. Those functions include functions relating to irrigation previously carried out by the National Irrigation Board. The Act also establishes a Commodities Fund and provides for incentives to growers and the registration of growers' associations.

V. Agriculture and Food Authority (AFA) Act, 2013

The Act consolidates the laws on regulation and promotion of agriculture and makes provision for the respective roles of national and county governments according to the provisions of the Fourth Schedule of the Constitution of Kenya.¹²

VI. The National Agricultural Sector Extension Policy (NASEP)

This policy promotes decentralization of extension by using clientele groups. The policy is however prone to market failures due to the fact that extension services fit properly within the class of “public good” services due to their externalities and free-rider realities. For that reason, the policy of privatization of extension services is hardly successful.

VII. EAC Development Strategy and the EAC Agriculture and Rural Development Policy

This policy elaborates the strategies of achieving the food security objective which includes increasing output, quality and availability of food and rational agricultural production through promoting complementarities and specialization under sustainable use and management of soil, water, fisheries and forests in order to conserve the environment. However, Smallholder interests are not directly addressed and there is no reference to sustainable development, farm energy.

VIII. The Kenya Agricultural and Livestock Research Organization (KALRO) Act

This law provides for the establishment and functions of the Kenya Agricultural and Livestock Research Organization and research institutes under it; to provide for organs of the Organization; to provide for the co-ordination of agricultural research activities in Kenya, and for connected purposes.¹³ This Act provides an administrative framework for agricultural research in Kenya and provides for the promotion and coordination of agricultural re-

12 Section 2, Agricultural Food Act, 2013.

13 ‘FAO.Org’ (*Fao.org*, 2020) <<http://www.fao.org/faolex/results/details/en/c/LEX-FAOC122139/>> accessed 11 November 2020.

search activities in Kenya.¹⁴ The main objective is to promote, streamline, co-ordinate and regulate research in crops, livestock, marine and fisheries, genetic resources and biotechnology as well as in research in crops and animal diseases; and to expedite equitable access to research information, resources and technology and promote the application of research findings and technology in the field of agriculture.¹⁵

IX. The Science, Technology and Innovation Act

This Act facilitate the promotion, co-ordination and regulation of the progress of science, technology and innovation of the country; to assign priority to the development of science, technology and innovation; to entrench science, technology and innovation into the national production system and for connected purposes. It also makes provision for the coordination and regulation of the progress of science, technology and innovation in Kenya. It establishes the National Commission for Science, Technology and Innovation to regulate and assure quality in the science, technology and innovation sector.

X. The Sessional Paper Number 3 of 2009 for the National Land Policy

The main aim of the National Land Policy is to secure rights over land in order to sustain growth, investment and reduction in poverty. This policy needs to undergo the necessary revision and re-alignment. There are no specific policy measures to realize the stated direction to enhance large-scale and small- scale food production. The Land Act does not appear to empower the National Land Committees to allocate land to needy individuals, but only to groups, and may therefore not address fully the Constitutional value and principle of equity with respect to land.

XI. The Biotechnology Policy, 2006

The policy addresses various issues with regards to capacity building and resource mobilization, financial and business support, public protection and support, public education awareness and access to information with regards to biotechnology, regional and international collaboration and ethical issues. The policy elaborates on the benefits of biotechnology including improved yields and the quality of crops due to resistance to diseases and pests. The policy directs for the enactment of the Biotechnology Act that will define a liability regime for damage resulting from the use of modern biotechnology but this would be after the event have already occurred.

14 'FAO.Org.' (*Fao.org*, 2020) <<http://www.fao.org/faolex/results/details/en/c/LEX-FAOC122139/>> accessed 11 November 2020.

15 (*Coursehero.com*, 2020) <<https://www.coursehero.com/file/p2ocfbf/development-and-promote-the-application-of-the-research-findings-and-results/>> accessed 11 November 2020.

XII. The Biosafety Act

The Act sets out to facilitate research in biotechnology and protect humans and the environment from adverse effects of products of biotechnology. The discretion on section 28 of the Biosafety Act, i.e. waiver of risk assessment, may be abused. Players may modify organisms without undertaking risk assessment, and hence posing significant risks to living organisms or environment since the requirement to have all processes and products assessed waived. The period of 90–150 days specified in the Biosafety Act for making a decision upon an application for Environmental Release as espoused under section 7 of the Act may be too short. The Authority requires sufficient time to examine the conformity of the application with the requirements under the Act, the accuracy and completeness of the information provided before the Authority, the risk assessment report/ information and the uses of the genetically modified organisms.

XIII. Cooperative Societies Act

The Act provides for the constitution, registration and regulation of co-operative societies and for other purposes incidental these objectives. Section 31 provides the framework for integration of producers for input supply and for marketing their produce while sections 42–43 provide for financial loans to the members of a cooperative society. This law is weak because it has no mechanisms for redress of mismanagement of cooperative societies.

XIV. The Sessional Paper Number 3 of 2013 on the National Productivity Policy

This is a policy response by the government to low productivity directs corrective measures. The policy many years old and therefore its validity for the current exigencies may stand to challenge, more so under the new Constitution where water and food is a right.

XV. National Food and Nutrition Security Policy

The National Food and Nutrition Security Policy (FNSP) provide an overarching framework covering the multiple dimensions of food security and nutrition improvement. The policy document considers that the growing problem of food and nutrition insecurity in Kenya is linked to the stagnated growth of agricultural production, low use of agricultural technology, high food prices, frequent disasters and climatic change. Its main specific objectives include: to achieve high level commitment and increase overall budgetary allocation for food and nutrition activities; to increase agricultural productivity and production of food that is diversified, affordable and able to meet diverse nutritional requirements of all people, to promote appropriate storage practices and expansion of storage facilities to extend shelf life and reduce farm losses; to diversify and attain sufficient nutritious foods in the Strategic Food Reserves to stabilize food supply and staple food market prices.

XVI. The Sessional Paper Number 2 of 2008 on the National Livestock Policy

The Sessional paper aims at achieving sustainable development of the livestock industry while improving and conserving animal genetic resources.

XVII. The National Irrigation Policy 2015

This policy sought to amend and consolidate the law relating to sustainable development and management of irrigation for the socio-economic development in the country; to align existing irrigation laws to the Constitution of Kenya 2010, to repeal the Irrigation Act, Chapter 347 Laws of Kenya; and for purposes incidental thereto and connected therewith.¹⁶ The Policy resulted in the Irrigation Act, 2019 and the Irrigation Regulations that are under development.

XVIII. Irrigation Act

This is a law that provides for the development, management and regulation of irrigation, to support sustainable food security and socioeconomic development in Kenya, and for connected purposes.¹⁷ This Act makes provision for the development of irrigation in Kenya. It applies to matters relating to the development, management, financing, and provision of support services and regulation of the entire irrigation sector.¹⁸ The provisions of this Act prevail in case of any inconsistency between it and any other legislation in matters relating to irrigation.¹⁹ The Act defines the functions and duties of the national government and county governments concerning matters of irrigation and establishes the National Irrigation Authority. The Authority, which is a body corporate, develop and improve irrigation infrastructure for national or public schemes and provide irrigation support services to private medium and smallholder schemes.

XIX. Agricultural Finance Act

This Act establishes the Agricultural finance corporation, whose function shall be to assist in the development of agriculture and agricultural industries by making available loans to farmers, co-operative societies, incorporated group representatives, public bodies, private companies, local authorities and other persons interested in agriculture.

16 'Ministry Of Agriculture | Ministry Policies' (*Kilimo.go.ke*, 2020) <<https://www.kilimo.go.ke/media-center/ministry-policies>> accessed 11 November 2020.

17 The long title to the Irrigation Act, 2019 (No. 14 of 2019).

18 'FAO.Org .' (*Fao.org*, 2020) <<http://www.fao.org/faolex/results/details/en/c/LEX-FAOC190954/>> accessed 11 November 2020.

19 http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/2019/IrrigationAct_No.14of2019> accessed 11 November 2020.

XX. Seed and Plant Varieties Act

This Act confer power to regulate transactions in seeds, including provision for the testing and certification of seeds; for the establishment of an index of names of plant varieties; to empower the imposition of restriction on the introduction of new varieties; to control the importation of seeds; to authorize measures to prevent injurious cross-pollination; to provide for the grant of proprietary rights to persons breeding or discovering new varieties; to establish a Tribunal to hear appeals and other proceedings; and for connected purposes.²⁰ It also makes provision for various matters relating to plant propagating material and plant breeders' rights.

XXI. The Warehouse Receipt System Act

The Act establishes a system whereby warehouse receipts are issued by licensed warehouses to depositors upon delivery of agricultural commodities. The law provides for the licensing of warehouse operators and warehouses, and for inspection of warehouses and the stored commodities by the Council. Stored commodities will be required to meet set standards and be weighed with certified equipment. The law also provides for negotiation of receipts by endorsement and delivery, and provides for the rights of transferors and transferees upon negotiation. The objective of the law is to provide the required legal framework and address marketing challenges associated with the cereals and grains subsectors.

C: OBSTACLES AND CHALLENGES

I. Declining Agricultural Performance

Declining performance of the sector in terms of its growth has been one of the major concerns facing policy makers and those having interests in the sector. The performance of agriculture, which remains the backbone of the economy slackened dramatically over the post-independence years from an average of 4.7 % in the first decade to only below 2 % in the 90s.²¹

II. Limited High Potential Agricultural Land and Over-Reliance on Rain Fed Agriculture

Only about 17 % of the country's land is high and medium potential agricultural land where most intensive crop and dairy production take place.²² The rest is arid and semi-arid, not suitable for rain fed agriculture. There is low utilization of irrigation potential with only

20 The Seed and Plant Varieties Act, 1972.

21 Muriu AR & Biwott H 'Agricultural Sector functional analysis: A policy regulatory and legislative perspective (2013) p.

22 Ibid.

less than 7 % of the cropped land under irrigation.²³ Poor rains always lead to poor agricultural performance and the subsequent famines affecting large sections of the population.

III. Limited Diversification of Agricultural Production

Narrow base of agricultural products, especially exports leads to high vulnerability of incomes to the international market trends.²⁴ The sector is characterized by weak vertical integration, made worse by weak institutions and support services for agricultural exports.

IV. Limited Exploitation of the Regional Market Potential

The regional markets that have resulted from regional integration, e.g., in the East African Community (EAC), Common Market for Eastern and Southern Africa (COMESA), and trade liberalization are yet to be exploited to a significant level.²⁵

V. Poor and Inadequate Rural Infrastructure

Poor infrastructure including poor rural roads, markets and transport systems that result in high transactions costs for farmers and inaccessibility to input and output markets are among the main concerns for the sector.²⁶ The performance of the sector is affected right from the production to marketing domestically and even internationally.

VI. Inadequate and Declining Research in Agriculture

Inadequate research, especially demand driven research, coupled with ineffective extension and delivery system of research findings has been yet another concern.²⁷ The decline in government allocation to the sector has contributed to this continuing trend.²⁸ The results here include decline in other agricultural services like artificial insemination services, lack of good quality seed and planting materials for farmers.²⁹ High costs have led to inadequate application of improved purchased inputs on most of the farms.

23 Teresa Salis, 'LECTURE II' (SlideServe, 2020) <<https://www.slideserve.com/teresa/lecture-ii-powerpoint-ppt-presentation>> accessed 11 November 2020.

24 (*Africanexponent.com*, 2020) <<https://www.africanexponent.com/post/africa-can-feed-itself-and-the-world-why-is-it-not-2193>> accessed 11 November 2020.

25 Goyal, A. & Nash, J., Reaping richer returns: public spending priorities for African agriculture productivity growth. Africa Development Forum series. Washington, DC: World Bank.2017.

26 Ibid.

27 Ibid.

28 Ibid.

29 (*Africanexponent.com*, 2020) <<https://www.coursehero.com/file/ph7ugj/Inadequate-and-declining-research-in-agriculture-Agricultural-research>>.

VII. Agricultural Sector Financing and Related Activities

The lack of finance for agriculture limits increasing production and investment in value addition activities in agriculture.³⁰ Inaccessibility to credit especially for small scale farmers and especially women has limited the range of activities, the type of technology used and the scale of operations that a farmer can adopt on his farm. Agricultural credit available to farmers has tended to diminish over time since independence.

VIII. Lack of a Comprehensive Land Use Policy

The country lacks a clearly articulated land policy with the result that issues like land use, management, tenure reforms and environmental protection are inadequately addressed through the existing systems.³¹ Land is an important resource in agriculture in Kenya and lack of access to or ownership of land is considered one of the major causes of poverty. The scarcity of agricultural land makes the issue of land use policy a critical one.

IX. Climate Change

While average annual rainfall is likely to increase due to climate change, changes in the variability of rainfall are expected to be more significant for agricultural production. Climate impacts are likely to be crop-specific.³² Studies shows that smallholder maize and tea production, find that temperature increase has a positive effect on revenue from tea but a negative effect on revenue from other crops. The impact of increased rainfall is the reverse; positive for crops and negative for tea.

X. Soil Fertility and Land Degradation

Soil fertility in Kenya is already poor and associated with low yields. For example, most smallholder maize yields in parts of western Kenya are less than two tons per hectare, compared with on-station yields of about nine tons per hectare, the result of continuous cropping, soil erosion, and the absence or underuse of organic and inorganic fertilizers.³³

30 Ibid.

31 Greatrex, et al. scaling up index insurance for smallholder farmers: Recent evidence and insights. CCAFS Report No. 14. Copenhagen: CGIAR Research Programme on Climate Change, Agriculture and Food Security, 2015.

32 Ibid.

33 Casaburi, Kremer & Mullainathan. Contract farming and agricultural productivity in Western Kenya. In S. Edwards, S. Johnson & D. N. Weil (Eds.), African Successes, Volume IV: Sustainable Growth (pp. 137–160), University of Chicago Press.2016.

XI. Public Expenditure

Most countries in sub-Saharan Africa are not meeting the target of allocating at least ten percent of public expenditure to agriculture, reaffirmed in the Malabo Declaration in 2014, but Kenya spends less than its regional neighbors.³⁴ In 2016/17, its allocation to the agriculture sector was less than two percent of total expenditure, well below the average for sub-Saharan Africa of 4.5 percent (World Bank, 2018).

D: RECOMMENDATION

Some of the challenges facing the agriculture sector are potential opportunities: population growth and urbanization increase the demand for food, while the agricultural trade deficit provides scope for domestic production to substitute imported production.

I. Policy Priorities

Research into policies most likely to raise agricultural productivity in Kenya includes investments in technology, the adoption of that technology, and reforms that strengthen farmers' economic incentives will increase agricultural production.

II. Farmer Knowledge and Organization

1. While technology is important in boosting productivity, knowledge and capacities of farmers themselves is equally important. An overly technocratic approach, which tends to characterize 'green revolution' debates, ignores the critical role of farmers in determining whether new external ideas are accepted and adopted. Farmers in areas where soil fertility is declining increase their use of fertilizer to boost production, but are never asked their views on the pricing, types or quantities of fertilizer, and other inputs they required.
2. There has been no long-term or consistent approach to research and technology development, and therefore no sustained adoption of new practices. Farmers' cooperatives and farmer organizations can be channels for farmers to access technologies, influence their design, and foster grassroots innovation.

III. Women's Empowerment

Research by the ministry of agriculture in nine counties of Western Kenya found that greater empowerment of women had a significant impact on agricultural productivity in plots managed by either women or men.

34 Ibid.

IV. Financial Services

1. Recent studies of agricultural index insurance point to rapid growth and tangible benefits for farmers buying these products. The Agriculture and Climate Risk Enterprise (ACRE), Sibiko and Qaim found that insurance uptake raises fertilizer intensity by 50 percent and seed expenditure by 65 percent, contributing to gains in maize yield of 60 percent.
2. However, uptake is still limited, attributed in part to farmers' lack of understanding of how such schemes operate. Two recommendations to address the specific challenge of collateral are to implement the Warehouse Receipt System which will allow farmers to use these receipts as collateral, and to explore the use of crop and livestock insurance as collateral.

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