DEEMED APPROVAL, REAL BARRIERS:
Navigating Kenya's Environmental Impact Assessment (EIA) Licensing Paradox

Kenya has within the past decades seen an increase in developmental projects creating an ever-increasing demand on land. As part of these undertakings, the Environmental Management and Coordination Act Chapter 387 of the Laws of Kenya (EMCA) requires developers to conduct an EIA and submit the report to the National Environmental Management Authority (NEMA) for approval. NEMA's Director General is then required within three (3) months to issue a decision on the EIA report. Parliament, in a bid to offer reprieve and perhaps with some foresight of bureaucratic inefficiency, contemplated the possibility of no decision being made within three (3) months. A developer may in such circumstances, exercise their discretion and initiate the project deeming approval under Section 58(9) of EMCA. However, despite this deemed approval, the developer stands to face an uphill task in securing sector specific licences and permits without an EIA licence under the Environmental (Impact Assessment and Audit) Regulations 2003 (the Regulations). This article will address the risks arising from proceeding under deemed approvals and the best steps to safeguard a developer's interests.

A) GETTING APPROVAL FOR YOUR PROJECT

With an ever-expanding field of environmental protections, it is imperative that for any developer intending to take on a project to undertake an EIA. This exercise is governed by the EMCA. All projects listed under the Second Schedule of EMCA require the preparation of an EIA report before commencing any operations. Further the acquisition of this licence clears the way for sectoral licences and permits that may be necessary for an undertaking.

A developer is required to have an EIA study or report prepared by an expert or a firm of experts duly authorised by NEMA for such purposes. Upon preparation of the report and submission to NEMA, NEMA, as per the Regulations is required to submit the report to the relevant technical advisory committee.

Additionally, NEMA must publish a public notice in the Kenya Gazette, **at least two newspapers with nationwide circulation**, and also have it **aired at least twice through a radio station broadcasting widely in the area where the proposed project is intended to be undertaken**. This publication is undertaken at the developer's expense.

The notice must contain four key elements: a brief description of what the project involves, the project's location, the inspection point where members of the public can view the EIA study, evaluation, or review report and the comment period with a sixty (60) days timeline for the public to submit oral or written comments on the report.

EMCA then gives the Director-General three (3) months to make a decision either approving and clearing the way for the project by the issuance of an EIA licence with such conditions as may be appropriate and necessary to facilitate sustainable development and sound environmental management or decline approval.

B) WHEN NEMA DOES NOT RESPOND, WHAT NEXT?

But what happens when this seemingly straightforward process hits a dead end after submission of the EIA study/report? The law does not contemplate silence as a response by the Director-General. The wording of section 58(9) EMCA leaves no room for doubt capturing as follows:

> ***"58. Application for an Environmental Impact Assessment Licence***
> *...(9) Any person who upon submitting his application does not receive any communication from the Director-General within the period stipulated under subsection (8)* ***may start*** *his undertaking..."*

Subsequently, where no response is forthcoming, a project proponent (the applicant developer) may elect to proceed with the same as if it were approved.

However, the challenge with deemed approval is that it does not clear the path for sectoral licences and permits that would require the presentation of an EIA Licence as per Regulation 4 of Regulations.

Further even where sectoral licences and permits may have been issued, they do not exempt the developer from conducting an EIA study before undertaking the project.

C) WHAT COURTS HAVE SAID

Courts have subsequently grappled with section 58(9) of EMCA addressing its constitutionality and projects proceeding under it. Notably in ***Bogonko v National Environment Management Authority (2006) 1 KLR (E&L) [2006] KEHC 10 (KLR)*** the High Court addressed a challenge by a developer whose EIA study was rejected by NEMA after he exercised his discretion to commence his project under section 58(9) of EMCA. Ultimately the Court declined to bar NEMA from auditing the project and cancelling it.

The facts of the case were that the Applicant sought approval to construct a petrol station along the Kisii–Kericho Highway. He submitted an EIA report to NEMA on 25th April 2005 but received no response within three (3) months. Relying on section 58(9) of EMCA, he assumed approval by default and commenced construction. NEMA later rejected the project and ordered him to stop, citing environmental concerns a month outside the statutory timeline.

At the High Court, the Applicant sought orders prohibiting NEMA from interfering with his discretion as exercised in line with section 58(9) of EMCA and to quash the decision by NEMA rejecting his study. NEMA argued that the Applicant had failed to comply with its directions to publish the study for two consecutive weeks to allow for public participation and that the Applicant should have appealed to the National Environmental Tribunal and not seek judicial review as he had done.

The court in addressing the proper forum found the High Court to be vested with jurisdiction at the time as it sought judicial review orders. This power is currently vested with the Environment and Land Court. The court also had to address the issue of whether a one-month delay was unreasonable which it found in the negative. Additionally, the court had to address the issue of prohibition against NEMA which the court held that EMCA allows NEMA to monitor the impact on the environment of ongoing projects and would not interfere with this power under section 69 (1) of EMCA. Declining to quash NEMA's decision, the Court also faulted the Applicant for not complying with NEMA's directions and therefore he could not rely on deemed approval under section 58(9) of EMCA when he was yet to comply with directions issued under the Act.

D) SAFEGUARDING YOUR PROJECT

For a developer seeking to limit risks to their project, compliance with EMCA is not merely a suggestion but is definitely one of the major compliance checks that stands between a successful project and wasted resources. Several steps must therefore be taken as follows:

- Assessing whether a project falls under the projects listed under the Second Schedule of EMCA.
- Appoint an expert or firm of experts approved by NEMA to conduct an EIA Study or Report. NEMA maintains a list of approved experts where a developer may reach one.
- Submit the report to NEMA in the prescribed manner and pay the requisite fees.
- Comply with all directions issued by NEMA especially on publication as may be directed.
- Maintain a copy of all communications with the NEMA.
- Wait out the three months period unless your project is exempt from preparation of a report.
- If no decision is rendered within the three (3) months, reach out to NEMA to follow up on the progress of its report.
- Move to the Environment and Land Court for orders of mandamus, compelling the Director-General to render a decision to provide certainty before commencing the project.
- If aggrieved by the decision of the Director-General to appeal the decision to the National Environmental Tribunal within sixty (60) days. (*For the avoidance of doubt, the Director-General's failure to render a decision within three (3) months is not a decision.*)

E) CONCLUSION

While the concept of deemed approval is a noble attempt by Parliament to address bureaucratic inefficiency, a developer is not exempt from compliance with the provisions of EMCA. Furthermore, failure to acquire the approval of

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NEMA would hamper the developer's ability to acquire sectoral permits that require proof of approval by NEMA, which deemed approval ultimately lacks. Additionally, NEMA's duty to consistently monitor projects for their environmental impact and compliance, is overarching and rarely will courts restrict the performance of this duty. A developer should endeavour to comply with the provisions of EMCA and directives by NEMA for them to reasonably rely on the concept of deemed approval. Ultimately, the best alternative would be to pursue mandamus orders against the Director-General to ensure a decision is rendered before committing to and financing a project.

This publication is provided for general information purposes only and does not constitute legal advice. Specific legal advice should be obtained for individual matters. should not be construed as a legal opinion or advise. If you need any further clarifications, please do not hesitate to contact **Anna Wanjohi, Partner** (***awanjohi@cmadvocates.com***) or **David Muthukia, Associate** (***dmuthukia@cmadvocates.com***) , or your usual contact at our firm, for legal advice.

Contributors:

Anna K. Wanjohi
Partner
awanjohi@cmadvocates.com

David Muthukia
Associate Advocate
dmuthukia@cmadvocates.com

CM Advocates LLP – Contact Details

Head Office Nairobi
I&M Bank House, 7th Floor, 2nd Ngong Avenue
T: +254 20 2210978 or +254 716 209673
P.O. Box 22588 – 00505, Nairobi Kenya
E: law@cmadvocates.com

Mombasa Office
Links Plaza, 3rd Floor, Links Road, Nyali
T: +254 041 447 0758 / +254 41 447 0548
P.O. Box 90056 – 80100, Mombasa Kenya
E: mombasaoffice@cmadvocates.com

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