ADA consortium

Mainstreaming Climate Adaptation into Planning

Review of the Legal and Financial Framework of the CCCF Mechanism

Final Report

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Acronyms

ADA	Adaptation Consortium
ASALs	Arid and Semi-Arid Lands
CCCF	County Climate Change Fund
CCCFPC	County Climate Change Fund Planning Committee
CCCFSC	County Climate Change Fund Steering Committee
CCCPC	County Climate Change Planning Committee
CCCSC	County Climate Change Steering Committee
CCD	Climate Change Directorate
CEC	County Executive Committee
CIDP	County Integrated Development Plan
CoG	Council of Governors
CPF	Common Programme Framework
CSP	County Spatial Plan
EDE	Ending Drought Emergencies
EMCA	Environmental Management and Coordination Act
GCF	Green Climate Fund
GIZ	Deutsche Gesellschaft für Internationale Zusammenarbeit
MTP	Medium Term Plan
NCCAP	National Climate Change Action Plan
NCCF	National Climate Change Fund
NDMA	National Drought Management Authority
NEMA	National Environment Management Authority
NSAs	Non-State Actors
PBOs	Public Benefit Organizations
PFMA	Public Finance Management Act
PwDs	Persons with disability
REB	Regional Economic Bloc
WCCPC	Ward Climate Change Planning Committee

1. Introduction

This report presents a review of the current legal framework for the County Climate Change Fund (CCCF) mechanism. The review was commissioned by the Adaptation Consortium (Ada), and covers the five counties of Garissa, Isiolo, Kitui, Makueni, and Wajir, where the Consortium has piloted the mechanism since 2012. It also analyses key policy and legal frameworks at the national level that have a bearing on the CCCF mechanism.

The review was undertaken to inform the scaling out of the mechanism to the rest of the country in the light of its successful implementation in the five counties. The specific objectives of the review are summarised in Table 1.

Table 1
Objectives of the review

1. To ensure alignment with the Constitution of Kenya 2010, relevant national policies and laws
2. To establish the 'legal feasibility' (legality) of integrating the key principles and design features of the CCCF mechanism into its governing legal frameworks be they Acts or Regulations
3. To advise on effectiveness and sustainability of CCCF structures
4. To ensure that the CCCF legal and regulatory framework is sufficiently robust to enable counties access climate finance from different sources
5. To ensure sufficient checks and balances for transparency, accountability and inclusiveness in the CCCF mechanism

The CCCF mechanism is, as the name implies, a county level mechanism for financing climate change adaptation. It consists of four components, namely: a County Climate Change Fund; Ward and County Climate Change Planning Committees (WCCPC and CCCPC); participatory planning approaches that include resilience assessment, resource mapping and climate information services; and participatory monitoring, evaluation and learning[1]. The mechanism is underpinned by five principles: community driven and bottom up planning; anchored within and supportive of devolution; flexible learning approach; focus on investment on public goods; and inclusion.

Following its successful piloting in the five counties, the scaling out of the mechanism to other counties has been prioritised in the National Climate Change Action Plan (NCCAP) for the period 2018 to 2022. The Plan envisages that by 30th June 2023, a total of 15 more counties will have developed CCCF regulations that are aligned with the Public Finance Management (Climate Change Fund) Regulations. ADA Consortium and the National Drought Management Authority (NDMA) are keen to ensure that the key principles and design features of the CCCF mechanism are mainstreamed in the scale out.

The report is divided into six parts. This introduction is followed by an overview of the background and context of climate change and decentralized climate change finance in Kenya. Section 3 explains the methodology used in the review, highlighting potential limitations. Section

[1] See generally, Victor Orindi, Ced Hesse, Yazan Elhadi, Mumina Bonaya and Kimberly Asawo. Guidelines for Establishing a County Climate Change Fund (Version 1 July 2018). Nairobi: Ada Consortium

4 reviews the legal and institutional framework for CCCF in the five pilot counties. Section 5 reviews the national policy and legal framework for climate change and climate finance and relates it to the legal framework for CCCF. Section 6 presents the conclusions and recommendations arising from the review.

2. Background and Context

Climate is a critical challenge to livelihood security, environmental sustainability and the realization of development objectives in Kenya. Nearly 90% of the country's landscape is classified as Arid and Semi-Arid Lands (ASALs)[2]. The distribution of rainfall is low and uneven, with about 82% of the country receiving less than 700 mm of rain per year[3]. As a result, the country is prone to weather-related disasters, including droughts and floods, which have profound adverse impacts on the economy and well-being of the citizenry.

The Government of Kenya has prioritised actions to address the challenge of climate change by formulating and implementing policies and laws and establishing institutional frameworks to promote adaptation and mitigation. Sustainable development is one of the national values and principles of governance set out in Article 10 of the Constitution of Kenya, 2010, which also devotes an entire chapter to land and environment[4]. The country's long-term development blueprint, *Kenya Vision 2030* aims to transform the country into "a newly industrialising, middle income country providing a high quality of life to all its citizens in a clean and secure environment"[5] by the year 2030.

Article 69(2) of the Constitution of Kenya, 2010

Every person has a duty to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources

The main policy and legal instruments formulated to address the challenge of climate change are respectively Sessional Paper No. 3 of 2016 on National Climate Change Framework Policy and the Climate Change Act 2016. Given that climate change is a cross-cutting issue, these two instruments are complemented by sectoral laws such as: the Environmental Management and Coordination Act (EMCA), the National Drought Management Authority Act, the Agriculture and Food Authority Act, the Forest Conservation and Management Act, the Wildlife Conservation and Management Act, and the Water Act. The NCCAP process mandated by the Climate Change Act provides a framework for coordinating different actors and sectors at both national and county levels to plan and implement activities to achieve the national goal of transition to a low carbon climate resilient development pathway.

Thanks to the governance reforms brought about by the Constitution of Kenya 2010, County Governments are now key players in the management of climate change. They have power to formulate policies, enact laws and establish institutions for climate change adaptation and resilience building. It is in exercise of these powers that the five counties have been put in place legal frameworks establishing CCCFs. With governance structures decentralised to the village

[2] Sessional Paper No. 8 of 2012 on National Policy for the Sustainable Development of Northern Kenya and other Arid Lands, p.1
[3] National Climate Change Action Plan 2018-2022, Vol. 1, p.10
[4] Chapter Five, part 2 of which (Articles 69-72) is on environment and natural resources
[5] p. vii

level across the country, county governments are well positioned to spearhead action on climate change by mainstreaming it into their County Integrated Development Plans (CIDPs) and County Spatial Plans (CSPs).

The successful piloting of the CCCF mechanism in the five counties has created a demand for the scaling out of the mechanism to other counties. This review is undertaken to capture the major lessons, challenges and good practices from the piloting to inform the scaling out of the mechanism in such a way as to build on strengths and address weaknesses.

3. Review methodology

This is primarily a desk review of county and national policy, legal and institutional frameworks for the CCCF mechanism. It identifies the major policy and legal instruments that have a bearing on the CCCF mechanism and reviews each and all of them against the principles and design features of the mechanism, with a view to establishing coherence in the frameworks within and between the different (i.e. national and county) levels of government.

The process aims to identify gaps if any in the existing CCCF policy, legal and institutional frameworks, as well as similarities and differences across the five legal instruments. Three of the five counties have used Acts, while two have used Regulations to establish the CCCF mechanism. The review interrogates the relative strengths and weaknesses, advantages and disadvantages of using Acts or Regulations. It also interrogates the extent to which the legal frameworks can be applied in dealing with cross-border/regional climate issues. Finally, it looks into the different institutional arrangements that have been used by the pilot counties and considers the relative effectiveness and sustainability of the different structures.

A major concern of the review is to interrogate the alignment (or lack thereof) of the existing CCCF mechanism frameworks to the Constitution and national policy, legal and institutional framework for climate change. Where appropriate, the review makes recommendations on how to better align the county frameworks to the national framework. It also considers alignment of the CCCF mechanism to the legal framework governing the Green Climate Fund (GCF).

A major methodological challenge for the review is the fact that the climate change policy, legal and institutional framework in Kenya is largely at a formative stage, with a sharp learning curve for both the national and county governments. While commendable progress has been recorded in the five counties, it is instructive that these are pilots and that any assessment of the good practices are effectively tentative. Moreover, even though Ada and NDMA are keen to see alignment between the existing CCCF frameworks and the national climate change policy, legal and institutional framework, the reality is that in many respects the five counties are ahead of the national government, so that the county experience with legal frameworks is richer than the national one. The institutional framework established by the Climate Change Act 2016 is yet to become fully operational, and the Regulations for operationalizing the Climate Change Fund are yet to take effect.

Nevertheless, the review establishes the current status of the policy, legal and institutional framework for the CCCF mechanism and how it relates to the national climate change architecture, and thereby provides a basis for designing frameworks for scaling out of the mechanism to other counties, building on the experience of the five counties.

4. Legal and institutional frameworks for CCCF in the five counties

The CCCF mechanisms established in the five pilot counties are based on either CCCF Acts enacted by the County Assemblies or CCCF Regulations issued under the Public Finance Management Act (PFMA). Garissa, Isiolo and Wajir enacted CCCF Acts, while Kitui and Makueni issued Regulations. The respective frameworks are examined in greater detail below.

4.1. Acts versus Regulations

A comparison between the Acts and the Regulations shows that they are substantively similar in their objectives and purposes, structure and content, though there are differences in detailed provisions across all the five legal frameworks. Provisions of the Regulations are as binding as those of the Acts. A major difference between an Act and Regulations is that the former is enacted by the County Assembly in exercise of the law making powers of the county government spelt out in Article 185 of the Constitution, while the latter is a subsidiary legislation made by the County Executive Committee (CEC) Member for Finance under section 116 of the PFMA, which is a law enacted by the national government. In practice, the adoption of Regulations is less onerous in terms of technicalities and less time-consuming, even though it is also subject to the constitutional imperative of public consultation.

Ultimately, the choice between an Act and a Regulation will depend on what the county government wishes to achieve. If the objective is merely to establish a fund at the county level that will be used to address climate change, then Regulations are the appropriate framework as envisaged in section 116 of the PFMA. Thus, to the extent that the objective of the current frameworks was to establish CCCFs, the approach of Makueni and Kitui is the more appropriate one.

However, if the county wishes to put in place a legal framework for addressing the challenges of climate change, which would also include provisions on mobilization and use of climate finance, then it would be appropriate to enact a climate change law. Such a law would draw on what is already in the national domain, but with adaptations to fit the circumstances of the county. The County Climate Change Act could then provide for establishment of a CCCF, in which case Regulations for establishment of the Fund would be subsidiary legislation of the County Climate Change Act. The provisions of those Regulations would still need to be aligned to the principles of the PFMA.

A county may also choose to adopt a County Climate Change Policy as a prelude to enacting a County Climate Change Act. However, while it is clearly within the mandate of county governments to adopt policies, it is questionable what value-added a climate change policy would bring to a county that wished to put in place a legal framework for addressing the challenges of climate change. Climate change is a national, regional and global phenomenon, even if its manifestations are experienced at county and local levels. As we demonstrate in section 5 below, Kenya already has in place a robust policy framework for climate change. The priority for county governments should be the implementation of these policies through laws, strategies and actions at the county level. This calls essentially for enactment of legal frameworks, which can be used to adapt the imperatives in the national policy framework to the specific realities of each county. In our view, this is an area where the development of a county level policy is unlikely to add much value, and would instead delay action and increase costs unnecessarily.

4.2. County Climate Change Fund Acts: Garissa, Wajir, and Isiolo

The Wajir CCCF Act was the first of the CCCF Acts to be passed. It came into force on 16th June 2016. Garissa and Isiolo passed their CCCF Acts in 2018, and the same are modeled on the Wajir Act.

The three Acts are broadly similar in their structure and main provisions. They are all divided into six parts, with the parts having the same titles save for Part III, which bears the title 'Oversight' in the Isiolo and Wajir Acts, and "Establishment of Steering and Ward Planning Committee' in the Garissa Act. The difference in titling notwithstanding, the Part provides for establishment of the Steering and Ward Planning Committees even in the Garissa legislation. Table 1 presents a comparison of the structures of the three Acts.

Table 1: Comparison of features of the three CCCF Acts

ISSUE	WAJIR	GARISSA	ISIOLO
Act divided into five parts (Part I – Part VI	X	X	X
Part 1 - Preliminary	X	X	X
Part II – Establishment and Administration of the Fund	X	X	X
Part III – Oversight	X		X
Part III – Establishment of Steering and Ward Planning Committees		X	
Part IV – Disbursement of the Fund	X	X	X
Part V – Financial Provisions	X	X	X
Part VI - Miscellaneous	X	X	X
County Planning Committee	X		X
Fund Administrator	X	X	X
Board		X	
Ward Planning Committees	X	X	X
Steering Committee	X	X	X
Climate Finance Framework (developed in consultative process, aligned to County Planning Framework)	X	X	X

In all the three Acts, the **Part I (Preliminary)** gives the short title to the Act, defines certain terms used in it, and states its objects and purposes. The main objective of all the three Acts is to establish a CCCF to finance climate change activities in the respective county. Though the wording may vary in some respects from one Act to the other, the three Acts articulate pretty much the same objects and purposes.

Part II of all the three Acts makes provisions regarding establishment and administration of the Fund. The contents of this Part vary in some detail from one Act to the other. Where the Wajir and Garissa Acts establish County Climate Change Fund Planning Committees, the Garissa Act establishes the County Climate Change Fund Board. Only the Isiolo Act provides for appointment of Ward Planning Committee in this Part. The Garissa Act deals with the appointment of the Ward Planning Committee in Part III, which is entitled 'Establishment of Steering and Ward Planning

Committee'. The Wajir Act also deals with the Ward Planning Committee in Part III, which as in the Isiolo Act is entitled 'Oversight'.

Table 2: Contents of Part II of the CCCF Acts

WAJIR	GARISSA	ISIOLO
1. Establishment of the Fund	1. Establishment of the Fund	1. Establishment of the Fund
2. Distribution of moneys from the Fund	2. Distribution of moneys from the Fund	2. Distribution of money from the Fund
3. Sources of the Fund	3. Sources of the Fund	3. Sources of the Fund
4. Climate Finance Framework	4. Climate Finance Framework	4. Climate Finance Framework
5. Establishment, functions and conduct of affairs of the County Planning Committee	5. Establishment, functions and conduct of affairs of the Board	5. Establishment, functions and conduct of affairs of the County Planning Committee
6. Appointment, functions and removal of the Fund Administrator	6. Appointment, functions and removal of the Fund Administrator	6. Appointment, functions and removal of the Fund Administrator
7. Secretariat of the County Planning Committee	7. Staff of the Board	7. Appointment, functions and conduct of affairs of Ward Planning Committees
		8. Secretariat of the Fund

All the three Acts provide for the money from the Fund to be distributed between administration costs, county and ward-level climate change projects respectively. Each Act allocates the bulk of the money (70%) to ward-level projects. Wajir and Garissa allocate 10% of the money to administrative costs and 20% to county-wide projects, while the allocation under the Isiolo Act is 3% and 27% respectively. Isiolo makes provisions for sharing and allocation of the Fund in a Schedule to the Act (Schedule 2), while Garissa and Wajir have these provisions in the body of the Act. Wajir and Garissa will need to revise their allocations to administrative costs as the Public Finance Management (County Government) Regulations limit this to a maximum of 3% of the total fund.

Part III of the three Acts is entitled "Oversight' in the Wajir and Isiolo Acts and 'Establishment of Steering and Ward Planning Committee' in the Garissa Act. In the Wajir and Garissa Act, the Part establishes the Steering Committee and the Ward Planning Committees, while in the Isiolo Act in only establishes the Steering Committee. The Isiolo Act clearly distinguishes between oversight functions on the one hand, and administration and management functions on the other hand. Although the Wajir Act has the title 'Oversight' for its Part III, it confuses the issue by including Ward Planning Committees in this Part, yet these do more than just providing oversight.

Part IV of the Acts is entitled 'Disbursement of the Fund' in all the three Acts. It makes provisions regarding the procedure for developing projects and applying for and accessing funding from the CCCF. It makes specific provisions about allocation of funds to the wards; eligibility criteria for projects to be funded; public participation in planning of projects; development and validation of project proposals; disbursement of funds to approved projects; procurement; and complaints mechanism. The provisions of this Part are pretty similar across the three CCCF Acts.

Part V of the Acts is entitled 'Financial Provisions". It provides for opening and operation of the Fund's bank account, the administrative budget for the Fund, and accounts of the County Planning Committee in the case of Wajir and Isiolo, and of the Board in the case of Garissa. The contents of the Part are similar across the three Acts.

Part VI of the Acts is entitled 'Miscellaneous'. In the Wajir and Garissa Acts, the part makes provisions regarding the making of Regulations for the better administration of the Act; protection of persons exercising powers vested on them by the Act from liability to any claims; and reporting and project evaluation forms. The content of this Part are the same across the three Acts, except that the Isiolo Act does not make reference to reporting and evaluation forms.

4.3. County Climate Change Fund Regulations: Makueni and Kitui

Makueni was the first county in the country to put in place a legal framework for the CCCF mechanism, with the Makueni County Climate Change Fund Regulations adopted in September 2015. The Kitui Regulations were adopted in June 2018.

The Regulations are made within the framework of the Public Finance Management Act[6], section 116 of which gives powers to the CEC member for finance to establish a public fund with the approval of the CEC and the County Assembly. While the substantive contents of the two Regulations are broadly similar, they are structured quite differently with significant variation in titling and the number of parts.

The Makueni Regulations are divided into five parts, while the Kitui Regulations are in seven parts. The Makueni Regulations make provisions about the institutional framework for the Fund in one part, while the Kitui Regulations have three separate parts for this (see Table 3 below).

Table 3: Comparison: structure of Makueni and Kitui CCCF Regulations

Makueni	**Kitui**
Part I - Preliminary	Part I - Preliminary
Part II – Establishment and management of Fund	Part II – Establishment of Fund
Part III – Institutional Framework	Part III – Kitui CCCF Steering Committee
Part IV – Service Providers	Part IV – Kitui CCC Steering Committee
Part V – Disbursement of Funds	Part V – The Ward Climate Change Planning Team
	Part VI – Operation of the Fund
	Part VII – Miscellaneous Provisions

Part II of the Makueni Regulations establishes the Fund, specifies its objects and purpose, and lists the sources thereof. It establishes the Climate Change Management Board to manage the Fund and specifies its composition, functions and powers. It also establishes the office of Fund Administrator and defines its functions, and makes provisions regarding disbursement of funds from the CCCF and preparation of annual statements of accounts by the Fund Administrator.

In the Kitui Regulations, Part II establishes the Fund, defines its purpose and lifespan, and specifies procedures for winding it up. Of the legal frameworks, this is the only one that defines the lifespan of the Fund and makes provisions on how it can be wound up. Regulation 6 provides that the Fund

[6] Hence the title Public Finance Management Act (Makueni County Climate Change Fund Regulations 2015)

shall exist for a period of ten years, while Regulation 7 stipulates that authority to extend the lifespan of the Fund beyond the ten years shall be sought from the CEC and the County Assembly.

Other provisions in this Part of the Regulations establish the office of Fund Administrator and define its functions, provide for capitalization of the Fund and lists the sources thereof. The Kitui Regulations are also the only CCCF legal framework to make specific Regulations on capitalization of the Fund, with Regulation 11 stipulating that the initial capital for the Fund "shall be not more than two percent of the County annual budget appropriated by the County Assembly".

Part III of the Makueni Regulations establishes the institutional framework for the Fund comprising the County Climate Change Steering Committee (CCCSC), the CCCPC, and the WCCPC. It defines the functions and specifies the composition of these structures. It also makes provisions for management of operation and project funds and for a participatory planning and budgeting process for the CCCF.

In the Kitui Regulations, the institutional framework is covered in Parts III-V. Part III establishes the CCCF Steering Committee, specifies its composition and functions and makes provisions regarding its meetings and payment of allowances to members. Part IV establishes the CCC Technical Committee, specifies its composition and functions, and makes provisions regarding its meetings and payment of allowances to members. Part V establishes Ward Climate Change Planning Teams, specifies their composition, nomination procedure and functions, and makes provisions regarding meetings of the Teams, their term of service, and reimbursement of members' transport costs.

Part IV of the Makueni Regulations is entitled "Service Providers" and makes provisions regarding selection of service providers and allocation of the money from the Fund. Regulation 27 states that "The allocation of County Climate Change Fund to various projects in the Ward and County levels shall be done by the Management Board using agreed criteria". It is not clear what those agreed criteria are. This contrasts with the Kitui Regulations which specify the fund allocation criteria under Regulation 37. Similar provisions are found in all the CCCF Acts (see the previous section).

Part V of the Makueni Regulations deals with disbursement of funds and makes elaborate provisions on how funds shall be managed and disbursed by both the CCCF Management Board and the WCCPCs. The Regulations are the only CCCF legal framework to specify authority limits for signing of cheques for project payments. Regulation 31(1) provides that the WCCPCs "shall only sign payments up to a limit of Kshs. 1,000,000 for payments to service providers. Regulation 31(2) states that payments in excess of that amount "will require the approval of the Fund Administrator". The Part also makes elaborate provisions for financial governance and management encompassing maintenance of financial records, reporting, accounting and audit. Similar provisions are contained in Part VI of the Kitui Regulations, and in this connection it is noted that the Regulations contain more elaborate provisions than the Acts.

The Makueni Regulations are the only legal framework that does not have a Part entitled 'Miscellaneous Provisions'. In the Kitui Regulations, 'Miscellaneous Provisions' are in Part VII, and provide for the development of Guidelines "for the proper management of climate change activities"[7], and for amendment to the Regulations. It is the only CCCF legal framework to make provisions on amendment. Regulation 47 provides that the CCCF Steering Committee "or any

[7] Regulation 46

other interested party" may recommend amendments to the CEC Member for Finance for consideration.

4.4. Comparing the CCCF Acts and the CCCF Regulations

Comparative analyses of the three Acts and the two Regulations have been undertaken in the preceding two sections. It is noted that all the five legislative frameworks are substantively similar, even though there may be variations between them in some details. The drafting of all the five frameworks is lacking in certain respects, and they could all benefit from more robust and professional drafting.

All the CCCF legal frameworks integrate the principles of the CCCF mechanism to the extent that this is possible in a legal framework. In particular, they put in place institutional frameworks that are inclusive, with a clear effort to ensure gender representation and the representation of all major interest groups in structures. The planning process is community-driven and bottom up, with the WCCPCs playing a central role in determining investment priorities, and most of the funding being allocated for ward-level projects. Only the Makueni Regulations do not have specific provisions on how funds are to be allocated, although they too are in accord with the other CCCF principles.

4.4.1. The CCCF Acts

The three CCCF Acts share the same structure in that all of them are divided into six parts, with most parts having the same titles. All the three CCCF Acts establish a three-tier institutional framework comprised of the CCCSC, the CCCPC (County Climate Change Fund Board in Garissa), and the WCCPC. Under the Wajir and Isiolo Acts the Steering Committee is chaired by the Governor, or in his absence the Deputy Governor, and is comprised of CEC Members for relevant departments, representatives of national government technical departments, and representatives of civil society and the business community. Under the Garissa Act, the Steering Committee is comprised of technical officers "appointed by respective CECs and institutions" and the members elect their chair at the first meeting.

The provisions on establishment, composition and functions of CCCPCs are similar across the three Acts. The representation in the Committees is similar (Chief Officers of relevant departments, representatives of relevant national government departments, and other interest groups within the county), although the number of members of the Committees varies. The Wajir Act provides for nine members, the Garissa Act for 15 members, and Isiolo Act for 16 members. Similarly, the provisions on Ward Planning Committees are substantially similar, but with variations in the number of members across the three Acts. The Wajir Act provides for six substantive and two ex-officio members, the Garissa Act provides for 11 substantive and an undefined number of ex-officio members, and the Isiolo Act provides for 12 substantive and one ex-officio member.

All the Acts provide for development of a Climate Finance Framework aligned to the County Development Framework to inform the planning of climate change action in the county. The Wajir Act stipulates that the Climate Finance Framework shall be published every two years; the Garissa Act provides that it shall be published annually; while the Isiolo Act provides for it to be published every three years. Given that the NCCAP is published once every five years, and the Climate Finance Framework is aligned to the County Planning Framework, which is governed by the CIDP that is also prepared once every five years, it would make sense for the Framework to be published every five years.

The three Acts contain similar provisions regarding the sources of funds, how the funds are shared between administration costs, country-wide projects and ward-level projects, criteria for allocation of funds, eligibility criteria, procedures for development and approval of project proposals, procurement framework and procedures, and complaints mechanism. Where there are differences between the Acts, these are in the detail rather than substance.

The three Acts were however, not accompanied by Regulations that would provide, sanction, grant or operationalize the Acts especially in regard to various provisions of managing public funds including financial management, procurement and asset disposals (specifically the PFMA).

4.4.2. The CCCF Regulations

There is more difference in the structure of the Regulations than there is in the Acts, even though here again, the substantive provisions are pretty similar. While the Wajir Act, which was the first one to be put in place appears to have significantly influenced the design of the two Acts adopted after it, the Kitui Regulations do not appear to be modeled on the Makueni Regulations that were the first ones to be adopted.

The Makueni Regulations are divided into five parts, while the Kitui Regulation are divided into seven. While the Makueni Regulations make provisions about the institutional framework for the Fund in one part, the Kitui Regulations have three separate parts dealing with the institutional framework.

The institutional framework is a critical element of the CCCF mechanism. In all the five legal frameworks, institutional arrangements are established to respond to three major imperatives, namely, policy/political oversight, technical guidance, and implementation. The institutional arrangements adopted in the Makueni Regulations appear to make the clearest distinction and separation of these roles, with a Climate Change Fund Management Board to manage the Fund, a Steering Committee to provide policy/political oversight, a Technical Committee to provide technical guidance, and Ward Climate Change Planning Teams to plan and implement adaption and mitigation activities. There is need to review, rationalize and better align the institutional frameworks for the CCCF mechanism, and the Kitui model provides a good starting point for doing this. The challenge here is to balance the imperatives of accountability with those of efficiency. The number of institutions established, the membership thereof and how they relate with each other are important considerations in this regard.

Like the three CCCF Acts, the Kitui Regulations specify how the funds are apportioned between administrative costs, county-level projects and ward-level projects, and puts in place detailed fund allocation criteria. The Makueni Regulations are the only CCCF legal framework that not to specify the apportionment of funds between administration costs, county-level projects and ward-level projects. The Regulations do not specify any fund allocation criteria, stipulating only that the funds shall be disbursed by the Management Board using agreed criteria.

The Makueni Regulations are the only framework with a fixed term and structured succession plan for the WCCPC. Regulation 25(d) provides that the Committee "will serve for a renewable term of three years, provided that two thirds of the committee members retire to allow for succession and continuity".

5. Relating the county frameworks to the national framework

At the national level, Kenya has an enabling policy, legal and institutional framework that provides a conducive foundation for the CCCF mechanism. The national framework consists of policy and legal instruments that have a bearing on climate change, as well as instruments on governance, economic planning and development, ASALs development, and public finance management. The key relevant instruments are highlighted below.

5.1. National policy and legal framework on climate change

Kenya has a robust policy and legal framework on climate change, comprising of the National Climate Change Framework Policy, the Climate Change Act, and the National Climate Change Action Plan 2018-2022. These policy and legal instruments are complemented by an array of policies and laws that aim to promote sustainable management of land, environment and natural resources.

5.1.1. National Climate Change Framework Policy

The goal of Sessional Paper No. 3 of 2016 on National Climate Change Framework Policy is to enhance adaptive capacity and resilience to climate change, and promote low carbon development for the sustainable development of Kenya. Its objectives include; to establish and maintain an effective and efficient institutional framework for mainstreaming climate change responses across relevant sectors and into planning, budgeting, decision-making and implementation, at both the national and county levels; and to provide a framework for mobilization of resources for Kenya's climate change response and ensure effective and transparent utilisation of the resources. Thus the CCCF mechanism responds to and advances the goal and objectives of the Policy.

The implementation framework for the National Climate Change Framework Policy consists of the Climate Change Act, 2016 and National Climate Change Action Plans that are aligned with and integrated into Medium Term Plans (MTPs) for Kenya Vision 2030.

5.1.2. Climate Change Act, 2016

The Climate Change Act, 2016 establishes the institutional framework for policy coordination, implementation and oversight; defines duties relating to climate change; institutionalizes the development of NCCAPs; and establishes the Climate Change Fund. One of its stated objectives is to integrate climate change into the exercise of power and functions of all levels of governance, and to enhance cooperative climate change governance between the national government and county governments.

Section 19 of the Act enjoins county governments to integrate and mainstream climate change actions, interventions and duties spelt out in the Act and NCCAP into relevant sectors, including through CIDPs and CSPs. Every county government is further enjoined to designate a CEC Member to coordinate climate change affairs. The Act envisages that county governments shall enact legislation to better define how they implement their mandates over climate change and requires them to report annually on progress of such implementation to the County Assembly, with a copy to the Climate Change Directorate (CCD).

The Climate Change Act complements other pieces of legislation that have a bearing on climate change, such as: the EMCA, the National Drought Management Authority Act, the Agriculture and Food Authority Act, the Forest Conservation and Management Act, the Wildlife Conservation and Management Act, and the Water Act. In order to mainstream climate change into the relevant sectors, these laws are to be reviewed and amended to integrate climate change imperatives.

5.1.3. National Climate Change Action Plan 2018-2022

The NCCAP is prepared in compliance with the provisions of section 13 of the Climate Change Act, 2016 to prescribe measures and mechanisms to mainstream adaptation and mitigation actions into sector functions of national and county governments. The current NCCAP is the second one. It builds on the achievements and experiences of the first Plan that was implemented during the period 2013-2017. Key among these achievements was the establishment of legal frameworks for CCCF mechanisms in the five counties.

The Plan prioritizes development of Regulations for the Climate Change Act, 2016, and support to county governments to develop legislation and regulations on climate change to create an enabling policy and regulatory framework for addressing the challenge of climate change. The legislation and regulations to be developed at the county level include "climate fund regulations that are informed by the local context, aligned to county systems, and conform to national public finance policies and laws... to... guide development and utilisation of County Climate Change Funds and enable climate finance to address County-specific local issues"[8]. The target is to have an additional 15 CCCF Regulations in place by 2022[9].

County governments are key players in implementation of the NCCAP given that they are responsible for climate change related activities such as agriculture, implementation of natural resource and environmental conservation policies; water management; county transport; water and sanitation; health; and putting in place measures for responding to climate-driven disasters such as droughts and floods. The NCCAP also envisages that county governments will support the work of the CCD by generating best practices, including through development of county legislation on climate change. Such best practices will be combined with those documented by the national government and shared in Kenya and through global climate change platforms.

5.2. National legal framework on governance

In the realm of governance, the Constitution of Kenya 2010 and the County Governments Act 2012 are the two key instruments that are of relevance to this analysis.

5.2.1 Constitution of Kenya 2010

Article 10 of the Constitution of Kenya articulates national values and principles of governance that are binding on any person developing or implementing policy in the country. They include sharing and devolution of power, democracy and participation, equity, transparency and accountability and sustainable development. The Constitution entrenches the right to a clean and healthy environment, which includes the right to have the environment protected for the benefit of present and future generations through legislative and other measures.

The Constitution establishes devolved government, the objects of which include: to give powers of self-governance to the people and enhance their participation in decisions affecting them, and to recognise the rights of communities to manage their own affairs and to further their

[8] p.72
[9] See Table 8 at pp.72-73

development[10]. It vests county governments with executive and legislative powers, which are exercised through the county executive and the county assembly respectively. In the Fourth Schedule, it mandates County Governments to implement national policies on natural resources and environmental conservation, and to ensure and coordinate participation of communities in governance at local level.

The national values and principles of governance provide a foundation for the approach of the CCCF that is underpinned by devolution and empowerment of communities for climate change action. The CCCF mechanism advances the cause of devolution, and directly facilitates county governments to implement natural resources and environmental conservation policies.

5.2.2. County Governments Act

The County Governments Act was enacted to give effect to the provisions of the Constitution on devolution. It is the legal framework for implementation of devolution and defines the functions of county governments, including the powers of County Assemblies to enact legislation. The enactment of the CCCF legal frameworks is done following the procedure for exercise of legislative powers specified under section 21 of the Act.

5.3. National policy framework on development planning

Kenya Vision 2030 is the country's long-term development blueprint, which guides national development planning. It is implemented through five-year MTPs, with the current MTP running from 2018 to 2022 being the third one.

5.3.1 Kenya Vision 2030

Kenya Vision 2030 aims to transform Kenya into a newly-industrializing, middle-income country providing a high quality of life to all its citizens in a clean and secure environment by 2030. Its vision for the environment is "a nation living in a clean, secure and sustainable environment". Among the strategies it spells out for achieving this vision is aggressive promotion of adaptation to climate change"[11]. Given the country's vulnerability to climate-change induced disasters, the document commits the government to undertake measures to integrate climate change into development planning.

5.3.2. Medium Term Plan III (2018-2022) Sector Plan for Climate Change

MTP II, implemented during the period 2013-2017 noted the importance of climate change, particularly as a threat to the realization of the objectives of Kenya Vision 2030. In particular, it recognized drought risk management and EDE as critical foundation for national transformation, and identified actions to address climate change, which included the formulation and implementation of the NCCAP and the formulation of a policy and legal framework on climate change.

MTP III, which runs from 2018 to 2022, incorporated climate change as a thematic area, with a view to having it mainstreamed into development planning, decision making and implementation in all sectors of the economy at national and county levels. Priority programmes and projects on climate change over the MTP period include: climate change governance and coordination, which includes mainstreaming of climate change actions into national and county governments' policies

[10] Article 174
[11] p.130

and plans; and capacity building and public awareness to strengthen institutional and human capacity, create awareness, establish dialogue, networking and alliance building on climate change, and integrate climate change into the education curriculum. Also prioritized are establishment of CCCF mechanisms by counties, which includes enactment of legislation, operationalization of the Climate Change Fund, and mainstreaming of climate change actions into the national and county governments sector plans.

5.4. National policy framework on ASALs development

The discourse on climate change in Kenya is closely linked to the discourse on development of the ASALs. Hence, it is not surprising that all the five counties that have led the way in establishment of the CCCF mechanism are found in the ASALs. The policy framework for ASALs development articulated in the ASAL Policy and EDE Framework focuses attention on climate change action in the ASALs, providing an enabling policy environment for the CCCF mechanism.

5.4.1. ASAL Policy

Adoption by the Kenya Government of Sessional Paper No. 8 of 2012 on National Policy for the Sustainable Development of Northern Kenya and other Arid Lands, popularly known as the ASAL Policy, marked a critical turning point in the discourse on ASALs development. The goal of the Policy is to facilitate and fast-track sustainable development in Northern Kenya and other arid lands that have suffered historical marginalization dating back to colonial times. Among its objective is to strengthen the climate resilience of communities in the ASALs and ensure sustainable livelihoods.

To achieve the objective of strengthening resilience to climate change, the policy articulates interventions on drought management and climate change, land and natural resource management, livestock production and marketing, dryland farming, livelihood diversification, and poverty and inequality. The CCCF mechanism provides a framework for supporting the implementation of all these activities in the ASAL counties, and thereby contributing directly to the achievement of the objectives of the policy.

5.4.2. EDE Framework

The EDE Common Programme Framework (CPF) provides a common strategy around which all stakeholders can harmonize their interventions in support of sustainable livelihoods in ASALs. Its overall goal is to strengthen the resilience of livelihoods in arid and semi-arid counties to the effects of drought and climate change. Implementation of the EDE Framework is organized around six pillars, namely: peace and security; climate-proofed infrastructure; human capital; sustainable livelihoods; drought risk reduction; and institutional development and knowledge management.

The EDE Framework has been mainstreamed into Kenya Vision 2030 and its implementation is aligned to the MTP of the Vision. The current EDE prioritizes implementation of the policies, programmes and projects outlined in the EDE sector plan through allocating increased resources and partnering with regional countries and other stakeholders including the private sector. Its flagship projects include establishment and operationalization of the National Integrated Drought Early Warning System, the National Drought Emergency Fund, and the Integrated Knowledge Management System for EDE. Other projects for the period include drought resilience and climate change adaptation; drought risk management and coordination; and drought contingency planning and response.

5.5. National framework on public finance management and climate finance

In so far as finance management is concerned, the relevant national policy and legal framework is that related to public finance management generally, as well as the one related specifically to climate finance management. These are the Public Finance Management Act, 2012, the National Policy on Climate Finance and the Public Finance Management (Climate Change) Regulations.

5.5.1. Public Finance Management Act, 2012

The PFMA is the legal framework for management of public finances by the national and county governments. It seeks to ensure that public finances are managed at both levels of government in accordance with the principles set out in the Constitution, and under the oversight of Parliament and county assemblies.

Part IV of the Act (sections 102-186) makes provisions regarding responsibilities of county governments with respect to management and control of public finance, asserting the requirement that county governments manage public finance in accordance with the principles on public finance articulated in Chapter Twelve of the Constitution. Section 116 of the Act gives the CEC Member for Finance powers to establish county funds with the approval of the CEC and the county assembly, and provides the legal basis for establishment of CCCFs. Sections 48, and 138 to 139 of the Act set out conditions for receiving and administration of grants/donations from funding partners.

That the establishment and management of climate finance falls within the framework of the Public Finance Management Act is recognized in the National Policy on Climate Finance, one of the objectives of which is to "foster strong national and county financial systems for climate finance building upon principles of the Public Finance Management Act, 2012 (as Amended 2014) while identifying and coding climate change expenditure within the national budget to aid in transparency and accountability of climate finance".

5.5.2. Public Finance Management (County Governments) Regulations, 2015

These Regulations were made by the Cabinet Secretary for the Treasury to, among other things, provide for the exercise of powers vested in the Cabinet Secretary and the CEC Member for Finance under the PFMA, and to harmonize the application of the said powers across county governments.

Part XV[12] of the Regulations provide for establishment of county public funds. A CEC Member responsible for a county government entity may propose to the CEC Member for Finance the establishment of a county public fund, stating the justification, and certifying in writing "that the functions and the public services to be delivered through the Fund cannot be delivered through the structure of budget appropriations"[13] and that establishment of the Fund and its continued existence will not depend on annual financing from the county exchequer. The CEC for Finance shall grant approval for establishment of the Fund in writing. Funds shall be established for a minimum of two years and a maximum of ten years in the first instance.

[12] Regulations 197-199
[13] Regulation 197(1)(b)

It should be possible for a County Government that has enacted a County Climate Change Act that provides for establishment of a CCCF to proceed to do so using the procedure set out under this Part.

5.5.3. Public Finance Management (Climate Change Fund) Regulations, 2018

These draft Regulations have been issued by the Cabinet Secretary for the Treasury to establish the Climate Change Fund, to provide financing mechanisms for priority climate change actions and interventions. Among other things the Fund shall provide loans and grants to finance the implementation of climate change adaptation and mitigation actions. County governments qualify to apply for funding from the Fund as implementing agencies.

Regulation 25 makes specific provisions on county governments' access to funding from the Fund. County governments may design projects and submit to the Fund for consideration and approval, and the Fund secretariat may also design projects for co-financing with county governments. The Fund shall use projects funded under Regulation 25 to build the capacity of county governments on climate change programmes, projects and initiatives.

Where CCCF mechanisms have been established, they provide county governments with ready to use frameworks for accessing funding from the Climate Change Fund once the Regulations are approved and the Fund becomes operational.

5.5.4. National Policy on Climate Finance

The National Policy on Climate Finance aims to facilitate effective mobilization of financial resources from both domestic and international sources to support initiatives that address challenges of climate change. It vests the national government with the responsibility of providing the overarching guidance and coordination framework for climate finance. It enjoins different sectors and levels of government to integrate climate finance considerations in their plans and programmes as appropriate.

The Policy sees county governments as key actors in mobilization and utilization of climate finance to achieve low-carbon climate resilient development goals. It positions the Council of Governors as the primary conduit for all matters of climate finance for the counties, and envisages that county governments shall consider climate finance in their efforts to mainstream climate change in CIDPs, taking into account national and county priorities.

5.5.5. Green Climate Fund (GCF)

GCF accredits organizations seen to have specialized capacities in driving climate action. Private, public, non-governmental, sub-national, national, regional or international bodies are all eligible to apply as accredited entities as long as they:

i) have clear, detailed and actionable climate change projects or programmes to present to GCF progressing mitigation and adaptation; and

ii) meet GCF standards based on financial standards, environmental and social safeguards, and gender.

In Kenya the National Environment Management Authority (NEMA) is the National Accredited Entity nominated by Treasury. Other accredited entities, e.g. GIZ, have already submitted proposals that cover implementation in Kenya.

The GCF offers opportunities for county governments to access global funding for climate change adaptation activities at county level. Specifically, County Governments can, through the CCCF mechanism, participate in GCF projects by:

i) Partnering with accredited entities to implement already approved projects by GCF (Kenya already has 6 projects approved to the value of US$ 2.8b)

ii) Co-financing GCF approved projects with already accredited national and international entities; and

iii) Direct application for accreditation (Direct Access Track). This requires nomination by the National Designated Authority (Treasury). Currently capacity to successfully apply may not exist at the County level therefore capacity building would be required in order to reach such a status. Counties can apply to GCF for support to build such capacities.

GCF application for accreditation and fiduciary standards are accessible on the web at https://www.greenclimate.fund

5.5.6. Performance based Climate Financing

Performance based climate financing is a result-oriented approach that provides incentives on achievement of agreed upon performance targets that can be objectively measured. For this to be realized priority should be given to performance measurement and performance metrics and data, incentives and performance evaluation.

In theory, the CCCF mechanism could adopt performance-based climate financing as a results-based approach to funding of climate adaptation and mitigation activities. In this connection, the CCCF mechanism could:

- establish a performance-based incentive policy framework at the county level;
- incentivize involvement of WCCPCs in project identification and prioritization;
- ensure that the policy framework emphasizes inclusion of women and youth in decision making in the CCCF project cycle and especially at the point of project identification and prioritization; and
- incentivize County Governments to devolve funds to enable independent decision making by WCCPCs.

This would call for adoption of policy and legal frameworks that allow performance-based climate financing e.g. by creating a fund that participates in the Kenya Government Performance based contracting by having the fund negotiate and set targets with the County Government. A county could also establish a performance-based challenge fund (as part of the main fund) under the CCCF that rewards innovative projects and ideas. This could potentially attract private finance. However, the challenge would be for counties to put in place robust performance data systems that generate appropriate information, performance evaluation systems and incentive systems.

In practice, however, the idea of performance-based climate financing is at best premature, and at worst ill-advised. Apart from the challenges of operationalizing it, there is a danger that it would undermine the equity imperatives of the CCCF mechanism. The introduction of performance metrics can easily create unintended distortions, and would, at this point in the evolution of the mechanism, impose an unnecessarily complicated additional layer on a process which for the target communities is already complicated enough as it is. It should be noted that counties and the national government are still struggling to establish and operationalize a basic M&E system for managing finances within the framework of devolution.

6. Conclusions and recommendations

This report presents a review of the five CCCF legal frameworks, comprising three Acts and two Regulations. The frameworks have been reviewed both individually and collectively. The review entailed comparative analysis of the five legal frameworks, and the national policy and legal framework. On the basis of the review, we make the following conclusions:

1. **The CCCF legal frameworks are well aligned** to the Constitution, the County Governments Act, and the Climate Change Act, and provide appropriate foundation for implementation of the Climate Change Act.
2. **All the CCCF legal frameworks integrate the principles** of the CCCF mechanism that can appropriately be integrated into legal frameworks, with clear emphasis on inclusive structures and community-driven, bottom up planning processes; but there is need to integrate stronger provisions in monitoring, evaluation and learning in the frameworks
3. **All the five legal frameworks are similar in** substance, even though there are variations between them in detailed provisions.
4. **Climate Finance Frameworks** are provided for in the Acts but not in the Regulations; and their timeframes vary across the three Acts
5. **Acts and Regulations have the same binding effect**, the main difference between an Act and a Regulation being that the former is enacted by the County Assembly, while the latter is a subsidiary legislation made under the Public Finance Management Act, which is a law enacted by the national government.
6. **Regulations are the appropriate framework** for establishing a public fund as envisaged under section 116 of the Public Finance Management Act, but if a county wishes to put in place a comprehensive legal framework for addressing the challenges of climate change then it would be appropriate for the County Assembly to enact a Climate Change Act.
7. **The main advantages of an Act over a Regulation** is that the former is an Act of the County Assembly, allows for more comprehensive coverage of climate change issues, including funding, and provides the possibility of making CCCF Regulations under the county legislation rather than under the PFMA, even though such Regulations would still need to be aligned to the principles of the PFMA.
8. **The draftsmanship of the legal frameworks is lacking** in certain respects, and they could all benefit from more robust and professional drafting.
9. **The Regulations are clearer than the Acts** in their provisions; and the Makueni Regulations are the clearest of them all.
10. **Although county governments have the power to adopt policies**, there is not much value-added that a climate change policy would bring to a county that wished to address the challenges of climate change, as the national policy framework is already sufficiently robust, and what is needed at the county level are laws, strategies and plans for implementation of the policy.

11. **None of the legal frameworks contain provisions** that respond to climate change issues that cut across county boundaries.
12. **The allocations and sharing of** money from the CCCFs between administration and projects should be revised to align with the provisions of the Public Finance Management (County Governments) Regulations.

Based on the conclusions, we make following recommendations for the way forward:

1. **The institutional frameworks** established by the Acts and Regulations should be reviewed, rationalized and better aligned to the imperatives of policy oversight, technical guidance, and implementation. In this connection, due attention should be paid to the number of structures established and how they relate with each other, to avoid duplication.
2. **The composition of structures established by the CCCF Acts** should be reviewed with a view to rationalization to ensure a fine balance between inclusiveness and efficiency, and clearly stipulate how representatives of interest groups are to be selected.
3. **The idea of Governors chairing County Climate Change Steering Committees** should reconsidered on grounds of efficacy.
4. **Timeframes for Climate Finance Frameworks** should be aligned to the CIDPs and the NCCAP; and the CCCF Regulations should also provide for their development.
5. **All the legal frameworks should be revised** to ensure more professional drafting. In this connection, consideration should be given to designing model CCCF legal frameworks that may be adapted to the specific circumstances of different counties while ensuring quality and alignment to the core principles of the CCCF mechanism.
6. **The legal and institutional frameworks** should be revised to incorporate imperatives necessary for accessing climate finance from the GCF, and county government should be supported to develop capacity for writing bankable proposals that may access GCF funding
7. **The CCCF legal frameworks should make explicit provisions** on the oversight role of the County Assembly with respect to the CCCF
8. **The CCCF legal framework should make provisions** on working with neighbouring counties to address cross-county climate change issues. The Council of Governors (CoG) and Regional Economic Blocs (REBs) should play important roles in this regard.
9. **The CCCF legal frameworks should contain more explicit provisions** on monitoring, evaluation and learning
10. **At this stage in the evolution of the CCCF mechanism**, it would not be appropriate of feasible to introduce performance-based financing

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