Embracing Sustainability Audit for Enhanced Corporate Environmental Compliance in Kenya

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Abstract

This paper examines the concept of sustainability audit as a means of increasing the percentage of businesses that comply with environmental regulations in Kenya. This is an activity that would be carried out as a follow-up to the environmental impact assessment and as a component of the process of environmental auditing, both of which are specifically envisaged under the provisions of the Constitution of Kenya, 2010, as well as the Environmental Management and Co-Ordination Act, 1999. The author explores the topic of environmental compliance by corporations, discusses the challenges that are associated with it, and argues that a sustainability audit is one of the approaches that may be used to address these difficulties. The framework known as Environmental, Social, and Governance (ESG), which is used to evaluate an organization's business practises and performance on a variety of different ethical and sustainable challenges, serves as the foundation for the discussion.

1. Introduction

This paper discusses the concept of sustainability audit as a means of increasing the percentage of businesses that comply with environmental regulations in Kenya. This is an activity that would be carried out as a follow-up to the environmental impact assessment and as a component of the process of environmental auditing, both of which are specifically envisaged under the provisions of the Constitution of Kenya, 2010, as well as the Environmental Management and Co-Ordination Act, 1999[1] (EMCA). In most cases, there is little evidence that most entities stick to ensuring that their activities are environmentally sustainable after the EIA process and NEMA's occasional audits for the most critical industries with higher chances of serious pollution of the environment. The author explores the topic of environmental compliance by corporations, discusses the challenges that are associated with it, and argues that a sustainability audit is one of the approaches that may be used to address these difficulties. The framework known as Environmental, Social, and Governance (ESG) will serve as the foundation for the discussion.

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[1] Environmental Management and Co-ordination Act, No. 8 of 1999, Laws of Kenya, Revised Edition 2019 [1999].

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2. Environmental Impact Assessment, Audit and Monitoring Framework in Kenya

The Environmental Management Coordination Act[2] (EMCA) includes provisions for environmental impact assessments (EIA) as a regulatory instrument for the purpose of protecting the environment from the effects of anthropocentric activities. Indeed, EMCA includes a variety of requirements that pertain to the execution of Environmental Impact Assessments (EIA), Strategic Environmental Assessments (SEA), Environmental Audits (EA), and management activities for air, water, wastes, and noise. Additional obligations in relation to environmental issues include the protection of wildlife, the administration of forests and water resources, and the guaranteeing of the health and safety of workers.

EIA is provided for in EMCA Section 58, which states that "notwithstanding any approval, permit or licence granted under this Act or any other law in force in Kenya, any person, being a proponent of a project, should before financing, commencing, proceeding with, carrying out, executing or conducting or causing to be financed, commenced, proceeded with, carried out, executed or conducted by another person any undertaking specified in the Second Schedule to this Act, submit a preliminary environmental impact assessment report.[3] EMCA defines "Environmental Impact Assessment" (EIA) as a systematic examination that is carried out to establish whether or not a programme, activity, or project will have any adverse impacts on the surrounding environment.[4] The contents of the reports from environmental impact assessment are provided for the *Environmental (Impact Assessment and Audit) Regulations, 2003*[5]. On the other hand, it is important to point out that the CBD COP 6 Decision VI/7 acknowledges that the essential components of an environmental impact assessment would inevitably comprise the following steps notwithstanding the fact that law and practice in different countries might differ significantly from one another. Initial assessment to evaluate whether proposed projects or developments needs to be followed up with a complete or partial impact study; The first step in conducting an impact

[2] Environmental Management Coordination Act, No. 8 of 1999, Laws of Kenya.
[3] S. 58(1), EMCA.
[4] S. 2, EMCA.
[5] Environmental (Impact Assessment and Audit) Regulations, 2003, Legal Notice No. 101 of 2003, Laws of Kenya.

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assessment is called scoping, and its purpose is to determine which possible implications are important to evaluate and then to develop terms of reference for the evaluation. Impact assessment is the process of attempting to forecast and identify the possible environmental repercussions of a proposed project or development while taking into consideration the inter-related consequences of the project proposal as well as the socio-economic implications; Identifying potential mitigation methods (which may include refraining from moving through with the development, searching for alternative designs or locations that circumvent the effects, building safeguards into the design of the project, or offering financial compensation for unintended consequences); Choosing whether or not to approve the project; monitoring and analysing the development activities, projected effects, and proposed mitigation measures to ensure that unanticipated consequences or failed mitigation measures are detected and handled in a timely manner; deciding whether or not to approve the project.[6]

In order to fulfil the responsibilities that are owed to the environment, Kenya's Constitution and the EMCA both mandate that environmental audits and monitoring be carried out at regular intervals.[7] EMCA provides the definition of environmental audit as the methodical, recorded, periodic, and objective examination of how effectively environmental organisation, management, and equipment are doing in conserving or protecting the environment.[8] Environmental audits and monitoring serve as follow-up instruments to establish the degree to which activities currently being carried out adhere to the environmental impact assessment study report concerns that are relevant to the specific project in question.[9]

The purpose of this procedure is to ensure that the assessment report is not deviated from in any way, since this might have negative repercussions for the surrounding environment. In accordance with EMCA, the National Environment Management Authority (NEMA) is required to perform environmental audits on all activities that are likely to have a significant effect on the environment. Additionally, NEMA is required to monitor all environmental phenomena in consultation with

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[6] Unit B, 'COP Decision' <https://www.cbd.int/decision/cop/?id=7181> accessed 9 November 2022.
[7] Constitution of Kenya, 2010, Article 69 (1) (f), Government Printer, Nairobi.
[8] EMCA, s. 2.
[9] *National Environment Management Authority (NEMA) - Environmental Audit (EA).* https://www.nema.go.ke/index.php?option=com_content&view=article&id=155&Itemid=274 (accessed 2023-06-16).

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lead agencies with the intention of performing an assessment of any potential changes in the environment and their potential impacts.[10]

As per EMCA, "environmental audit" means the systematic, documented, periodic and objective evaluation of how well environmental organisation, management and equipment are performing in conserving or preserving the environment while "environmental monitoring" means the continuous or periodic determination of actual and potential effects of any activity or phenomenon on the environment whether short-term or long term.[11] The Authority or its designated agents is responsible for carrying out environmental audit of all activities that are likely to have significant effect on the environment.[12] The owner of the premises or the operator of a project for which an environmental impact assessment study report has been made is required to keep accurate records and make annual reports to the Authority describing how far the project conforms in operation with the statements made in the environmental impact assessment study report submitted under section 58(2).[13]

While the Act is silent on sustainability audit, it provides that one of the general principles towards guaranteeing the right to clean and healthy environment is that every person should cooperate with state organs to protect and conserve the environment and to ensure the ecological sustainable development and use of natural resources.[14] Such audits and monitoring can be expanded to include sustainability audit of companies as a way of enhancing sustainability of their operations.

3. Environmental, Social and Governance (ESG)

The Environmental, Social, and Governance (ESG) framework is a tool utilised by stakeholders to gain insight into an organization's management of risks and opportunities associated with ESG criteria. These criteria encompass environmental, social, and governance factors. The ESG

[10] EMCA, s. 68 & 69.
[11] EMCA, s.2.
[12] Ibid, s. 68(1).
[13] Ibid, s. 68(3).
[14] Ibid, s. 3(2A).

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framework adopts a comprehensive perspective that recognises the broad scope of sustainability, encompassing not only ecological concerns but also social and governance considerations.[15]

The international framework for corporate environmental compliance is comprised of a variety of treaties, standards, and principles. These were created with the intention of making it easier to enforce environmental laws and regulations and ensure that businesses complied with them. Although such conventions, principles, and norms in most cases bind states, they are directly relevant to corporations due to the fact that a state is able to regulate the actions of a company within its jurisdiction in order to ensure that such activities are in line with its responsibilities under international law.[16]

Collective action may most effectively be accomplished via the establishment of global environmental agreements. They "are rarely the end product, but rather create the framework and the process that guide responses to the environmental problem in question," according to some authors.[17] Agreements not only facilitate contacts between nations but also encourage reciprocity and demand that governments put in place the regulations essential to addressing environmental issues. In the end, the purpose of all of these roles, outputs, and substantive measurements is to work towards enhancing the health of the environment.[18]

As environmental problems, such as climate change, become more widespread, it is no longer acceptable to let companies' actions and inactions go unchecked. As a means of preventing environmental harm caused by businesses on a national and international scale, the principle of environmental liability has just come into existence. In addition, concepts of corporate governance such as corporate social responsibility demand that businesses take into account the repercussions that their economic activities will have on society when making decisions.[19] There is a school of

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[15] *ESG (Environmental, Social, & Governance)*. Corporate Finance Institute. https://corporatefinanceinstitute.com/resources/esg/esg-environmental-social-governance/ (accessed 2023-06-11).

[16] Escobar-Pemberthy, N.; Ivanova, M. Implementation of Multilateral Environmental Agreements: Rationale and Design of the Environmental Conventions Index. *Sustainability* 2020, *12* (17), 7098; Andresen, S.; Boasson, E. L.; Hønneland, G. *International Environmental Agreements: An Introduction*; Routledge, 2012; Brown Weiss, E. The Evolution of International Environmental Law. 2011; *Framework Principles on Human Rights and the Environment (2018)*. OHCHR. https://www.ohchr.org/en/special-procedures/sr-environment/framework-principles-human-rights-and-environment-2018 (accessed 2023-06-11).

[17] Escobar-Pemberthy, N.; Ivanova, M. Implementation of Multilateral Environmental Agreements: Rationale and Design of the Environmental Conventions Index. *Sustainability* 2020, *12* (17), 7098. https://doi.org/10.3390/su12177098.

[18] Ibid.

[19] Buckley, P 'Can Corporations Contribute directly to society or only through regulated behaviour' Journal of the British Academy, 6 (sl), p. 323-374.

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thought that contends the idea of environmental governance is an essential component of what is known as corporate social and environmental responsibility.[20]

While discharging their responsibility to promote the success of a company, directors are required under the Companies Act to take into consideration the effects that the firm's activities will have on the local community as well as the natural environment.[21] In addition, the Act requires that directors, while they are compiling their reports, include information regarding issues pertaining to the environment and take into account the effect that the operations of the firm have on the surrounding environment.[22]

The Climate Change Act of 2016 establishes a legal framework for a more robust response to climate change, as well as policies and processes designed to realise low-carbon climatic development.[23] The Act applies to all aspects of the economy and mandates the implementation of measures aimed at incorporating responses to climate change into the process of development planning, as well as the provision of incentives and obligations for the contribution of the private sector towards the achievement of low carbon climate development and the promotion of low carbon technologies.[24] Additionally, it places climate change responsibilities on commercial businesses, which may also be compelled to submit reports on the status of the fulfilment of such commitments.[25] NEMA has been given the authority under the Act to monitor, investigate, and report on whether or not both private and public entities are complying with their responsibilities as outlined in the Act.[26] When carrying out their operations, corporations have a responsibility to keep in mind the provisions of the Climate Change Act of 2016, since this legislation is crucial to the corporate environmental compliance process.

It is, therefore, important for the stakeholders in environmental and corporate management and governance to work together towards ensuring that the activities of these companies promote or at least do not adversely contribute to environmental degradation and climate change.

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[20] MSV. Prasad, 'Corporate Environmental Governance: A Perception of Indian Stakeholder', available at https://ecoinsee.org/conference/conf_papers/conf_paper_18.pdf, (accessed on 28/11/2019).
[21] Companies Act, No. 17 of 2015, s. 143 (1) (d), Government Printer, Nairobi.
[22] Ibid, s. 655 (4) (b).
[23] Climate Change Act, No. 11 of 2016, Government Printer, Nairobi.
[24] Ibid, s. 3.
[25] Ibid, s. 16.
[26] Ibid, s. 17.

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4. Sustainability Audit: Scope and Indicators

In 2015, the member states of the United Nations unanimously agreed to adopt the 2030 Agenda for Sustainable Development. This agenda includes 169 objectives and 17 goals related to sustainable development. The United Nations General Assembly announced in resolution 70/1 that the Sustainable Development Goals and Targets would be monitored and evaluated using a set of global indicators that would concentrate on quantifiable results.[27] Therefore, the reporting done by companies is a significant data source for the framework used to track progress towards the Sustainable Development Goals. Reporting, which serves as a primary source of information on company performance, has the potential to enrich and enhance the monitoring mechanisms for the Sustainable Development Goals. It does this by providing stakeholders, such as governments and providers of capital, with the means to evaluate the economic, environmental, and social impact that companies have on sustainable development.[28]

Risk assessment based on sustainability from the perspectives of all stakeholders, including financial, social, environmental, and technical ones, and risk management are the main areas of attention for sustainability accounting and auditing.[29] The technocratic paradigm, which places an emphasis on hard data and its potential to give comprehensive control over persons, institutions, and systems, predominates in contemporary sustainability auditing.[30]

The use of indicators may enhance the quality of decisions and trigger more effective actions by simplifying, clarifying, and making aggregate information more available to decision-makers. This can lead to improvements in both choice quality and action effectiveness. In this particular setting, the SI have been used as instruments with the purpose of assisting in gaining an understanding of the idea of sustainability. This awareness has been achieved via the utilisation of a methodological

[27] United Nations Conference on Trade and Development. *Guidance on Core Indicators for Sustainability and SDG Impact Reporting*; 2022, p. 1.
[28] Ibid, p.1.
[29] Fagerström, A.; Hartwig, G. *Accounting and Auditing of Sustainability: A ModelnterTitle*; 2016.
[30] Reid, J.; Rout, M. Developing Sustainability Indicators–The Need for Radical Transparency. *Ecological Indicators* 2020, *110*, 105941.

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approach that is tied to the new paradigms of Sustainable Development.[31] Indicators of Sustainability (SI) are metrics that aim to quantify the degree of sustainability and gather information for improved decision-making about policies, programmes, initiatives, and activities linked to sustainability. The SI looks to be a vital instrument for assessing development objectives as a sustainable proposition now that its significance has been shown with regard to public policy.[32]

Indicators of sustainability are an important tool for businesses to have. Concerns over the environment have been more prevalent throughout the years. These companies have a lot to offer, particularly in the area of minimising the negative externalities they cause. This must be accomplished via their plans and tactics, but it is very necessary that there be a technique that is adequate for judging how effective these measures have been.[33] These are the techniques that may be used to evaluate how well a company's strategy has been implemented. These actions are tied to certain goals and are outlined in a strategy for the corporate sustainability of the organisation. For instance, cutting down on waste or one's carbon impact throughout the manufacturing process. Implementation of these standards is used to determine whether or not progress is being achieved in the desired direction.[34] The use of these indicators is done mostly for the purpose of determining whether or not the organisation is successful in achieving its goals. In the event that there is a deviation, appropriate remedial actions may be taken. Therefore, sustainability indicators are used to assess not only the profitability of the organisation but also how well it carries out its aims.[35]

The process of developing indicators is always a two-way affair. Indicators are not only sought by policy goals, but they also serve to concretize and shape those goals in many ways. As a result, the process of producing indicators cannot be limited to a strictly technical or scientific scope; rather, it need to be characterized by open communication and a focus on policy.[36] Indicators that are acceptable for this function need to be straightforward and unambiguous about their purpose: a) the number of indicators should be kept to a minimum, and the process of calculating them should

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[31] Batalhao, A., de Fatima Martins, M., van Bellen, H.M., Ferreira Caldana, A.C. and Teixeira, D., 'Sustainability Indicators: Relevance, Public Policy Support and Challenges' (2019) 9 Journal of Management and Sustainability 173, p.174.
[32] Ibid, 173.
[33] APLANET. *Sustainability indicators: definition, types of KPIs and their use in the sustainability plan*. APLANET. https://aplanet.org/resources/sustainability-indicators/ (accessed 2023-06-28).
[34] Ibid.
[35] Ibid.
[36] Valentin A and Spangenberg JH, 'A Guide to Community Sustainability Indicators' (2000) 20 Environmental impact assessment review 381, p.381.

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be made public; b) the indicators should be directionally clear, which means that they should point out items and trends that are obviously relevant in terms of their importance for sustainability, and they should be sensitive, which means that they should be able to signal either progress or the absence of progress.[37]

While there may be challenges in development of these indicators, stakeholders from different sectors can work together to develop a set of indicators that are both relevant to the country and easy to follow up on.[38] Thus, such challenges should not be used as a hindrance to not promoting development of the SI for promoting sustainability audit in the country.

It has been pointed out, and properly so, that sustainability consists of environmental, economic, and social aspects (occasionally institutions are mentioned as the fourth dimension), each of which contains a lot of components that make it up. Therefore, indications of sustainability may be as varied as the components of the system, and they can also differ with respect to worldviews, objectives, and scales of time and space. There are a lot of indicators, but most of them only reflect some elements of human–environmental systems. Some of them are more integrative than others, but none of them are sufficient to measure all of the characteristics of sustainability by itself.[39] In addition, It is becoming more widely acknowledged that the most significant value of the terms "sustainability" and "sustainable development" rests in their focus on uniting the various aspects, the most prevalent classifications of which are environmental, economic, and social. In light of this, efforts to promote sustainability need to centre on the holistic, integrated totality of human and environmental systems. Sustainability indicators must be more than environmental indicators; they must be about time and/or thresholds.[40] Development indicators should be more than growth indicators; they should be about efficiency, sufficiency, equity, and quality of life. Development indicators should be more than growth indicators; they should be about efficiency, sufficiency, equity, and quality of life. When it comes to our attempts to make sustainable development a reality, indicators and indices are very necessary for developing a scientific knowledge and

[37] Ibid, pp. 381-82.
[38] See Batalhao, A., de Fatima Martins, M., van Bellen, H.M., Ferreira Caldana, A.C. and Teixeira, D., 'Sustainability Indicators: Relevance, Public Policy Support and Challenges' (2019) 9 Journal of Management and Sustainability 173.
[39] Wu J and Wu T, "Sustainability indicators and indices: an overview." *Handbook of sustainability management* (2012): 65-86.
[40] Ibid, 84.

formulating effective policies.[41] These measurements will need to continue to increase in complexity and sophistication as time goes on in order for them to keep up with the demands placed on them by the ever-worsening state of environmental and socioeconomic issues. The process of discovering suitable and efficient indicators of sustainability is one that involves evolution as well as learning new things.[42]

5. Embracing Sustainability Audit for Enhanced Corporate Environmental Compliance in Kenya

It has been suggested that conceptualizing sustainable development as a decision-making strategy enables for it to truly be "used," therefore going beyond the rhetoric and converting sustainability and its "action-guiding" capacity into a notion that can "action-generate." At a minimum, the three issues listed below need to be taken into consideration if one wishes to get an understanding of the connections that exist between sustainability and decision-making, and as a result, the actualization of sustainable development as a method for making decisions: The term "sustainability" should be understood with consideration given to its organising principles, which should then be applied to a particular socio-environmental setting; information-structuring (the inherent multi-dimensional complexity of sustainability should be organized into operational information units, such as indicators, and correctly presented in order to feed the decision-making process); and Impact (the knowledge on sustainability ought to have a significant impact both on the process of making decisions and on the process of actually implementing sustainable development).[43]

In Kenya, reporting on the economic, environmental, and social elements of a company's activity, in addition to the company's engagement with various stakeholders, is not a regular practice. There is a need for the country to entrench reporting especially on sustainability in its corporate and environmental laws, if sustainability goals are to be achieved in the country. This should be enforced in line with the provisions of section 655 of the Companies Act[44] which requires that unless the company is subject to the small companies regime, the directors shall include in their

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[41] Ibid, 84; see also Farrell, A. and Hart, M., What does sustainability really mean? The search for useful indicators. *Environment: science and policy for sustainable development*, *40*(9), pp.4-31.

[42] Ibid, 84.

[43] Waas, T.; Hugé, J.; Block, T.; Wright, T.; Benitez-Capistros, F.; Verbruggen, A. Sustainability Assessment and Indicators: Tools in a Decision-Making Strategy for Sustainable Development. *Sustainability* **2014**, *6* (9), 5512–5534. https://doi.org/10.3390/su6095512.

[44] Companies Act. No. 17 Of 2015, Laws of Kenya. Revised Edition 2021 [2015]

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report a business review that complies with subsection (3), so far as relevant to the company.[45] The purpose of the business review is to inform members of the company and assist them to assess how the directors have performed their duty under section 144.[46] In the case of a quoted company, the directors are required to specify in the business review (to the extent necessary for an understanding of the development, performance or position of the company)—(a) the main trends and factors likely to affect the future development, performance and position of the business of the company; (b) information about— (i) environmental matters (including the impact of the business of the company on the environment); (ii) the employees of the company; and (iii) social and community issues, including information on any policies of the company in relation to those matters and the effectiveness of those policies; and (c) information about persons with whom the company has contractual or other arrangements that are essential to the business of the company.[47] There is a need for stricter enforcement of these provisions coupled with sustainability audit to ensure that both quoted and unquoted companies' activities promote the Government's efforts towards achieving sustainability in the country. The Brundtland Commission's definition of sustainability is a complex and multifaceted concept, making it an aspirational goal for public policy. It gives equal weight to environmental, economic, social, and institutional considerations as it does to other factors.[48] The Office of the Registrar of companies should work closely the NEMA in order to enhance the effectiveness of non-financial reporting through promoting sustainability audit to ensure transmission of verifiable data on economic, social, environmental and governance data, as a way of promoting sustainable development based on true data.

6. Conclusion

There is a pressing need for the development of well-thought-out sustainability assessment systems that involve governments, industries, and non-governmental organisations. These systems need to be able to provide certainty and assurance to either consumers or the general public regarding the sustainability of particular industry practices and activities. This would go a long way towards generating increased understanding of environmental and social concerns while encouraging the

[45] Ibid, s.655(1).
[46] Ibid, s.655(2).
[47] Ibid, s.655(4).
[48] Valentin A and Spangenberg JH, 'A Guide to Community Sustainability Indicators' (2000) 20 Environmental impact assessment review 381, p. 381.

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development of sustainable practices across organisations and businesses. It would also go a long way towards assessing and communicating sustainability attributes. This should be done in a way that is open, honest, and critical as we go forward with the creation of the sustainability assessment systems.[49] Embracing Sustainability Audit for enhanced corporate environmental compliance is the way to go as we seek to attain true Sustainable Development.

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[49] Reid, J.; Rout, M. Developing Sustainability Indicators–The Need for Radical Transparency. *Ecological Indicators* 2020, *110*, 105941.

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