

SPECIAL ISSUE

Kenya Gazette Supplement No. 217 (Acts No. 53)



REPUBLIC OF KENYA

NATIONAL COUNCIL FOR
LAW REPORTING
LIBRARY

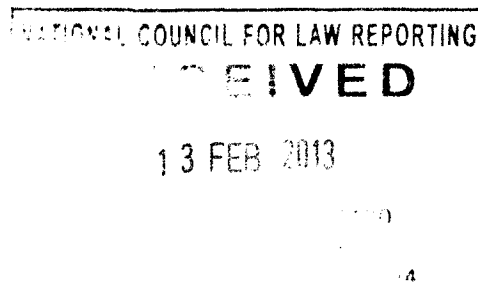
KENYA GAZETTE SUPPLEMENT

ACTS, 2012

NAIROBI, 4th January, 2013

CONTENT

Act—	PAGE
The Seeds and Plant Varieties (Amendment) Act, 2012.....	2097



THE SEEDS AND PLANT VARIETIES (AMENDMENT) ACT**No. 53 of 2012***Date of Assent: 31st December, 2012**Date of Commencement: 4th January, 2013***AN ACT of Parliament to amend the Seeds and Plant Varieties Act****ENACTED** by the Parliament of Kenya, as follows—

1. This Act may be cited as the Seeds and Plant Varieties (Amendment) Act, 2011.

Short title.

2. The long title of the Seeds and Plants Varieties Act, in this Act referred to as “the principal Act”, is amended –

Amendment of the long title to Cap.326.

(a) by deleting the words “discovering new varieties” and substituting therefor the words “discovering and developing new varieties”;

(b) by inserting the words “to establish a national centre for plant genetic resources” immediately before the words “to establish a Tribunal”

3. Section 2 of the principal Act is amended—

Amendment of section 2 of Cap. 326.

(a) by deleting the definition of “authorized officer”;

(b) by deleting the definition of plant variety” and substituting therefor the following—

“plant variety” means a plant grouping within a single botanical taxon of the lowest known rank, defined by the expression of the characteristics resulting from a given genotype or combination of genotypes distinguished from any other plant grouping by the expression of at least one of the said characteristics and considered as a unit with regard to its suitability for being propagated unchanged;

- (c) by inserting the following new definitions in their proper alphabetical sequence—

“authorization” means the delegation of some or all aspects of seed certification and seed testing services by the Inspectorate to a competent private or public person;

“breeder” means the person who breeds, or discovers and develops a seed or plant variety and includes the employer of such a person;

“inspector” means a person appointed under section 3B(1)(a);

“national variety list” means the list of all plant varieties which are for the time being exploited commercially;

“plant examiner” means a suitably qualified person appointed under section 3B;

“protective direction” means the provisional protection given to applicants for rights while pending actual grant of rights under paragraph 1 of the Third Schedule in regard to an application for plant breeders’ rights;

“seed analyst” means a suitably qualified person appointed under section 3B;

“seed crop” means a crop grown for the production of certified seed;

“seed field” means a field where registered seed crop is grown;

“Service” means the Kenya Plant Health Inspectorate Service established by the Kenya Plant Health Inspectorate Service Order, 1996 or its successor;

(d) by deleting the definition of the words “positive direction”.

(e) by deleting the definition of the word “scheme”

4. Section 3 of the principal Act is amended—

Amendment of
section 3 of Cap.
326.

(a) in subsection (1) by deleting the words “regulation and control of the” appearing immediately after the words “make regulations for the”;

(b) in subsection (3)—

(i) by inserting the following new paragraphs immediately after paragraph (g)—

(h) provide for governance of forestry seeds and other species including domestication of wild plants;

(i) provide for the maintenance and propagation of varieties that are not commercially attractive to the private sector, and

(j) provide for the integration and harmonization of the seed industry;

(ii) by renumbering paragraph (h) a paragraph (k).

5. The principal Act is amended by inserting the following new sections after section 3—

Insertion of new
section 3A in Cap.
326.

National designated
authority.

3A. The Service shall be the national designated authority for matters relating to seeds and plant variety protection and shall, subject to the directions of the Minister, be responsible for the administration of this Act.

Appointment of
inspectors, analysts and
examiners.

3B. (1) For the purposes of enforcing the provisions of this Act, the Service—

- (a) shall appoint seed inspectors, seed analysts and plant examiners; and
- (b) may authorize competent private or public persons to perform specified functions under this Act on its behalf:

Provided that an authorization may be withdrawn in cases of misconduct.

(2) The Service shall publish in the Gazette—

- (a) the names of the seed inspectors, seed analysts and plant examiners appointed or authorized under subsection (1)(a) or (b), and
- (b) the names of persons whose authorization is withdrawn.

(3) Subject to the provisions of section 3 (2)(b) the Service shall specify the scope and aspects of authorized activities for inspectors in the instruments of appointment.

(4) A person appointed under subsection (1)(a) shall not, while being so appointed, engage in any business connected with the production, processing, sale or distribution of seeds.

(5) A person appointed under this section shall be issued with proof of identification in a form prescribed by the Inspectorate.

Power of inspectors.

3C. (1) An inspector may—

- (a) at all reasonable times and upon producing his identification issued under section 3B(5), enter any place or premises—
 - (i) for the purposes of enforcing any provision of this Act;
 - (ii) in which he reasonably believes a seed material to which this Act applies is being, or has been processed, stored or used;
 - (iii) in which he reasonably believes there is seed material that is contaminated;
 - (iv) which is used or capable of being used in the processing of seeds;
- (b) examine any seed or material found in any place or premises;
- (c) open any package found in any place or premises that he has reason to believe contains seed material; and
- (d) require any person to produce for inspection or for the purpose of obtaining copies thereof or extracts therefrom, any books, shipping bills, bills of lading, documents containing instructions, or any other document or papers concerning any matter relevant to the administration of this Act.

(2) The owner or the person in charge of any place or premises referred to in subsection (1) shall give an inspector all reasonable assistance required to enable the inspector carry out his duties and shall furnish him with any information he may reasonably require for the purpose of enforcing this Act.

(3) Any person who refuses entry to an inspector acting under this section or obstructs him from entering or inspecting, or who, without reasonable excuse, fails to produce any seed material for examination or any document required under this section shall be guilty of an offence.

Seizure and disposal of seeds and seed processing facilities.

3D. (1) Whenever an inspector reasonably believes that the provisions of this Act have been breached, the inspector may seize and detain any seeds in respect of which, the breach has been committed.

(2) Any seeds seized under subsection (1) shall not be detained -

(a) for a period exceeding fourteen days, in cases where, after investigation, the inspector finds that no provision has been breached; or

(b) for a period exceeding six months, unless upon the inspector finding that a provision of the Act has been breached, proceedings have been instituted in court within that period, in which case the seeds may be detained until the proceedings are concluded.

(3) A court may, upon convicting a person of an offence under this Act, make an order—

- (a) for the forfeiture or disposal of any seed in respect of which the offence was committed; or
- (b) requiring the convicted person to pay for the costs or expenses incidental to the analysis of any seed or seed processing facility in respect of which the conviction was obtained.

(4) Where an inspector seizes any seed and the owner or person in whose possession the seed was at the time of the seizure consents, in writing, to its disposal, such seed shall be disposed of in such manner as the Service may direct, under the supervision of the Service, at the expense of the owner or person consenting to the disposal.

(5) Any person who obstructs an inspector in the exercise of his powers under this section commits an offence.

3E. (1) No person who is or who has been engaged in the enforcement of the provisions of this Act shall disclose, except for the purpose of the exercise of his functions or when required to do so by a court or under any written law, any information acquired in the exercise of functions under this Act.

(2) Any person who contravenes the provisions of subsection (1) commits an offence.

Disclosure of
confidential information.

Amendment of
section 8 of
Cap. 326.

6. Section 8 of the principal Act is amended in subsection (4) by deleting the words “agro ecological value” and substituting therefor the words “value for cultivation and use”.

Insertion of new
section 8A in Cap.
326.

7. The principal Act is amended by inserting the following new section immediately after section 8—

Maintenance of national
plant variety list.

8A. (1) The Service shall cause the preparation of a national plant varieties list which shall comprise the names of plant varieties released for commercialization.

(2) The Service shall maintain and update the national varieties list and shall cause its publication in the Gazette and in such other manner as to afford access to it by members of the public.

Amendment of
section 9 of Cap.
326.

8. Section 9 of the principal Act is amended—

(a) by deleting subsection (1) and substituting therefor the following new subsection—

(1) The Minister may, in consultation with representatives of such organizations as he deems to have a substantial relevant interest in the matter to be regulated, make regulations for the carrying out of national performance trials, and may by order apply such regulations to any class of plant varieties within the national varieties list and to any new varieties in that class.

(b) by deleting subsection (2) and substituting therefor the following new subsection—

(2) For the purposes of this section, a plant shall be deemed to be a new plant variety if it was not on the national variety list on the date of the coming into operation of an order under subsection (1), unless it had been exempted under subsection (3).

- (c) in subsection (9) by deleting the words “three years” and substituting therefor the words “three seasons”.
- (d) in subsection (10) by deleting the word “index” and substituting therefor the words “national variety list”.
- (e) in subsection (11) by inserting the following new paragraph immediately after paragraph (f)—
 - (g) for the conduct and management of performance trials and reports.

9. Section 10 of the principal Act is amended—

Amendment of
section 10 of Cap.
326.

- (b) in subsection (1) by deleting the word “index” and substituting therefor the words “national varieties list”;
- (c) by inserting the following new subsection immediately after subsection (3)—
 - “(4) Any person who—
 - (a) with intent to defraud, gives false information to a seed inspector a seed analyst or a plant examiner,
 - (b) obstructs, hinders, interferes with or fails to comply with any lawful order given by any seed inspector in execution of his powers or duties under this Act;
 - (c) makes or causes to be made any false statement, false advertisement, and or produces or displays any certificates required to be produced or displayed, under this Act which are false in any material particular;
 - (d) while not registered as a seed merchant, imports, processes seed and packages seed for sale purposes

- (e) sells or displays for sale any seed which does not correspond with the description in any certificate required to be produced or displayed under this Act;
- (f) offers for sale, seed that fails to meet the requisite standards or has been rejected at any seed certification stage;
- (g) otherwise contravenes any other provisions in this Act,

shall be guilty of an offence, and upon conviction, shall be liable to a fine not exceeding one million shillings or to imprisonment for a term not exceeding two years, or to both.

Amendment of
Section 11 of Cap.
326.

10. Section 11 of the principal Act is amended by deleting the word “Minister” and substituting therefor the word “Service”.

Amendment of
section 14 of
Cap.326.

11. Section 14 of the principal Act is amended by deleting the words “five thousand” and “six months” and substituting therefor the words “one million” and “two years” respectively.

Amendment of
Section 15 of Cap.
326.

12. Section 15 of the principal Act is amended by deleting the word “Minister” wherever it appears and substituting therefor the word “Service”.

Amendment of
section 16 of
Cap.326.

13. Section 16 of the principal Act is amended by—

- (a) deleting subsection (2) and substituting therefor the following new subsection—

“(2) The Service may, with the approval of the Minister by order in the Gazette—

- (a) develop guidelines and protocols for the management of emerging technologies in seed production; and
- (b) apply this section to any area in Kenya where persons are engaged in growing crops for seeds of any type or variety of plant specified in the order, if he is satisfied that in that area satisfactory arrangements have been made for locating such crops so as to isolate them from crops or plants which might cause injurious cross-pollination.

- (b) by deleting the word “Minister” wherever it occurs in the section and substituting therefor the word “Service”.

14. Section 17 of the principal Act is amended by—

Amendment of
Section 17 of Cap.
326

- (a) deleting all the words appearing after the words “in respect of” in sub section (1) and substituting therefor the words “varieties of all plant genera and species”
- (b) deleting subsection (4).

15. Section 18 of the principal Act is amended—

Amendment of
Section 18 of Cap.
326.

- (a) in subsection (1) by deleting the words “as respect” and substituting therefor the words “with respect to”
- (b) by deleting subsection (2) and substituting therefor the following new subsection—

(2) An applicant for plant breeders’ rights must be the breeder, and the provisions of Part I of the Fourth Schedule shall have effect with regard to two or more persons who have independently bred, discovered and developed a plant variety.

(c) by deleting sub section (4).

Amendment of
section 19 of
Cap.326.

16. Section 19 of the principal Act is amended—

(a) by deleting subsection (1) and substituting therefor the following—

(1) Breeders' rights shall be granted for a fixed period of twenty years from the date of the grant, except in respect of trees and vines where the said period shall be twenty-five years from the date of the grant.

(b) by deleting subsections (2), (3), (4), (5) and (8);

Amendment of
section 20 of Cap.
326.

17. Section 20 of the Principal Act is amended—

(a) in subsection (1) by—

(i) deleting the word “authorize” appearing in the introductory portion and substituting therefor the word “permit”;

(ii) deleting paragraph (a) and inserting the following new paragraphs—

(a) production or reproduction;

(b) conditioning for the purpose of Propagation;

(c) offering for sale;

(d) selling or other marketing;

(e) exporting;

(f) importing, or

(g) stocking for any of the purpose set out in the foregoing paragraphs.

(iii) by renumbering paragraph (b) as paragraph (h).

(b) inserting the following new subsections immediately after subsection (1) —

(1A) the matters referred to in subsection (1) (a) to (g) in respect of harvested material, including entire plants and parts of plants, obtained through the unauthorized use of propagating material of the protected variety shall require the permission of the breeder, unless the breeder has had reasonable opportunity to exercise his right in relation to that propagating material.

(1B) Subject to subsections (1) and (1A), the matters referred to in subsection (1) (a) in respect of products made directly from harvested material of the protected variety falling within the provisions of subsection (1) (b) through the unauthorized use of the said harvested material shall require the permission of the breeder, unless the breeder has had reasonable opportunity to exercise his right in relation to the said harvested material.

(1C) The provisions of subsection (1) (a) to (c) shall in addition apply in relation to—

- (a) varieties which are essentially derived from the protected variety, where the protected variety is not itself an essentially derived variety;
- (b) varieties which are not clearly distinguishable from the protected variety, and
- (c) varieties whose production requires the repeated use of the protected variety.

(1D) For the purposes of subsection (1C) (a), a variety shall be deemed to be essentially derived from another variety (“the initial variety”) where—

- (a) it is predominantly derived from the initial variety, or from a variety that is itself predominantly derived from the initial variety, while retaining the expression of the essential characteristics that result from the genotype or combination of genotypes of the initial variety;
- (b) it is clearly distinguishable from the initial variety, and
- (c) except for the differences which result from the act of derivation, it conforms to the initial variety in the expression of the essential characteristics that result from the genotype or combination of genotypes of the initial variety.

(1E) Notwithstanding the provisions of subsection (1), within reasonable limits and subject to the safeguarding of the legitimate interests of the breeder, farmers may use the product of the harvest which they have obtained by planting, on their own holdings, the protected variety

- (c) in subsection (2) by inserting the words: “and harvested material and products” immediately after the word “reproductive”;
- (d) in subsection (4) by deleting the word “authorizing” and substituting therefor the word “permitting”.
- (e) in subsection (5)—

- (i) by deleting the word “authorized” appearing in the introductory portion and substituting therefor the word “permitted”;
- (ii) by deleting the word “authorises” appearing in paragraph (a) and substituting therefor the word “permits”;
- (iii) by deleting the word “authorities” appearing in paragraph (b) and substituting therefor the word “permits”.

18. The principal Act is amended in section 21—

Amendment of
section 21 of Cap.
326.

- (a) by deleting subsection (3);
- (b) by adding the following new subsections at the end of the section—

(7) The breeder’s right shall not extend to acts concerning any material of the protected variety, or of a variety covered by the provisions of section 20 (1) (a) which has been sold or otherwise marketed in Kenya by the breeder or with his consent, or any material derived from the said material, unless such acts—

- (a) involve further propagation of the variety in question; or
- (b) involve an export of any material of the variety, which enables the propagation of the variety into a country which does not protect varieties of the plant genus or species to which the variety belongs, except where the exported material is for final consumption purposes.

(8) For the purposes of paragraph (a), “material” in relation to a seed or plant variety means—

- (a) propagating material of any kind;

- (b) harvested material, including entire plants and parts of plants, and
- (c) any product made directly from the harvested material.

Amendment of section 21 of Cap. 326.

19. Section 22 of the principal Act is amended—

- (a) in subsection (1) by deleting all the words appearing immediately after the word “varieties”,
- (b) in Subsection (2) by deleting the words “authorized officer” and substituting therefor the word “Service”.

Amendment of section 23 of Cap. 326.

20. Section 23 of the principal Act is amended by deleting sub section (4).

Repeal of Section 27 of Cap. 326.

21. The principal Act is amended by deleting section 27.

Insertion of new section in Cap 326.

22. The principal Act is amended by inserting the following new section immediately after section 27—

Establishment of National Plant Genetic Resources Centre.

27A. (1) There is established a National Plant Genetic Resources Centre which shall be responsible for the conservation and sustainable utilization of plant biodiversity in Kenya.

(2) The functions of the National Plant Genetic Resources Centre shall be to—

- (a) protect the ownership of indigenous seeds and plant varieties, their genetic and diverse characteristics, associated indigenous knowledge and its use by the communities of Kenya;

- (b) carry out inventories by evaluating and mapping plant genetic resources distribution in the country;
 - (c) conserve plant genetic diversity by devising and implementing management procedure, including *ex-situ* and *in-situ* maintenance;
 - (d) co-operate with international institutions on matters relating to plant genetic resources, including the administration of material transfer agreements;
 - (e) ensure safe custody and accessibility of all plant bred and naturally occurring germplasm;
 - (f) document and disseminate plant genetic resources data and information to users;
 - (g) collaborate with and institutions of higher learning to address adaptive, applied and strategic research;
 - (h) enhance capacity for the effective conservation of plant genetic resources; and
 - (i) advice the Government on policies governing the conservation and use of plant genetic resources.
- (3) There shall be a National Plant Genetic Resources Centre Committee which shall provide oversight on matters relating to the centre.
- (4) The Minister may make regulations to provide for the membership and functions of the Committee.

Amendment of
section 29 of Cap
326.

23. Section 29 of the Principal Act is amended—

(a) in subsection (i) by inserting the following new paragraphs at the end of subsection (1) immediately after (f)—

(g) regarding certification; or

(h) regarding compensation arising from seed production and sale.

(b) by inserting the following new subsections immediately after subsection (1)—

(1A) A duly certified copy of any determination or order of the Tribunal may be filed in the High Court by any party to the proceedings before the Tribunal, and on such filing the determination or order may, subject to any right of appeal conferred by or under this Act, be enforced as a decree of the court.

(1B) The Tribunal shall, upon filing a copy of a decision under subsection (1A) transmit to the court its record of the proceedings before it, and the record shall be filed by the court along with the certified copy of the determination or order.

Amendment of
section 30 of Cap.
326.

24. The principal Act is amended in section 30 by deleting subsection (7) and substituting therefor the following—

(7) Any person who—

(a) fails to comply with the provisions of subsection (5);

(b) gives a false statement in relation to any material particular; or

(c) obstructs or impedes, or attempts to obstruct or impede, any authorized officer from

exercising the powers conferred by this section,

commits an offence and shall be liable on conviction to a fine not exceeding fifty thousand shillings or to imprisonment for a term not exceeding one year or to both.

25. The principal Act is amended by deleting repealing 33 and replacing it with the following new subsection—

Repeal and replacement of section 33 of Cap. 326.

General Penalty.

33. A person who is convicted of an offence under this Act for which no other penalty is provided shall be liable to a fine not exceeding twenty thousand shillings or to imprisonment for a term not exceeding six months, or to both.

26. The principal Act is amended in Part II of the Fourth Schedule by deleting paragraph 2 and substituting therefor the following new paragraph—

Amendment of the Fourth Schedule to Cap. 326.

2. A variety shall be deemed to be new if, at the date of filing of the application for a breeder's right, propagating or harvested material of the variety has not been sold or otherwise disposed of to others, by or with the consent of the breeder, for purposes of exploitation of the variety—

- (a) in Kenya, for a period of more than one year; or
- (b) outside Kenya, for a period more than four years,

or, in the case of trees or vines, for a period of more than six years.

27. The principal Act is amended by repealing the Fifth Schedule.

Repeal of the Fifth Schedule to Cap. 326.

28. The principal Act is amended in the Sixth Schedule by deleting the word "advocate" and substituting therefor the words "person qualified to be appointed as a judge of the High Court".

Amendment of the Sixth Schedule to Cap. 326.