

Sustainable Development: Conflict or Synergy in Promoting both Protection of Wildlife and Economic Development in Wildlife Conservancies in Kenya

By: Peter Mwangi Muriithi

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Abstract

Sustainable development seeks to limit environmental damage which includes wildlife while promoting economic growth through economic activities. The author seeks to question; whether the sustainable development has succeeded as a panacea to the prevalent disputes that are based on the divergent interests of protection of wildlife in wildlife conservancies and promoting economic activities in wildlife conservancies in Kenya.

Succinctly, the paper shall; give a brief introduction, outline the historical perspective of sustainable development, analyze the legal framework providing for sustainable development in Kenya, analyze the role of the concept of sustainable development and question whether it creates synergy or conflict in promoting both protection of wildlife in wildlife conservancies and promoting economic activities in wildlife conservancies in Kenya and lastly give recommendations and a conclusion.

1.0 Introduction

To realize UN sustainable development goals¹ and even the ambitious Kenya vision 2030² objectives, wildlife as part of the environment is at the heart of such a discourse. The importance of wildlife in Kenya cannot be understated.

*LL.B-University of Nairobi, PGDL, Patent Agent, Court Accredited Mediator, MCI Arb, LL.M-University of Nairobi, & Publisher.

¹UN Sustainable Development Goals were adopted by UN General Assembly in September 2015

<<https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainable%20Development%20web.pdf>> accessed on 04/05/20

²Kenya Vision 2030 <<https://vision2030.go.ke/>> accessed on 04/05/20

In Kenya, wildlife plays multifaceted critical roles which include; critical ecological functions that are important for the interconnected web of life-supporting systems, socio-cultural and aesthetic values and contribution to Kenya's economic growth through wildlife tourism. Wildlife tourism is the proverbial goose that lays the golden egg in the Kenyan economy. Bluntly stated it is the lifeline to Kenya economy. Wildlife conservation is thus inextricably linked to Kenya's economic development and the livelihood of its people.³ This at the very least illustrates the importance of wildlife in Kenya and why it is at the centre of this discourse.

Summarily stated, UN sustainable development goals and Kenya vision 2030 main objective can be generally be termed as to transform Kenya into a newly industrializing, middle-income country by ensuring a sustainable environment for its future generations. Wildlife forms part of the environment,⁴ hence its conservation is vital to the realization of such futuristic and vital goals.

Section 2 of the Wildlife Conservation and Management Act⁵ defines some of the terms that this paper adopts. In this regard, it defines; *wildlife* as any wild and indigenous animal, plant or microorganism or parts thereof within its constituent habitat or ecosystem on land or in water, as well as species that have been introduced into or established in Kenya. Further, it defines *wildlife conservancy* as land set aside by an individual landowner, body corporate, group of owners or a community for purposes of wildlife conservation.

Paramount to this discourse is the widely discussed concept of *sustainable development*. The Concept of Sustainable Development predates the 1972 Stockholm Conference and can be traced back to traditional communities and

³ Paul Udoto, *Wildlife as a Lifeline to Kenya's Economy: Making Memorable Visitor Experiences*, volume 29, No. 1 page. 51–58 (2012).

⁴Section 2 of the Environmental Management and Co-ordination Act Act No. 8 of 1999 "Environment" includesthe biological factors of animals and plants and the social factor of aesthetics...."

⁵ Act No. 47 of 2013

ancient civilizations.⁶The exact meaning of *sustainable development* remains unclear as there is no agreed definition of what constitutes Sustainable Development.

Sustainable development seeks to limit environmental damage arising from anthropogenic activities and to lessen the depletion of non-renewable resources and pollution of the environment while promoting economic growth.⁷

*The Brundtland Commission*⁸ considered sustainable development to be “development that meets the needs of the present generation without compromising the ability of future generations to meet their own needs.” On the other hand, Section 2 of the Environmental Management and Co-Ordination Act No. 8 of 1999 defines sustainable development “as development that meets the needs of the present generation without compromising the ability of future generations to meet their needs by maintaining the carrying capacity of the supporting ecosystems.”⁹Essentially, from these definitions sustainable development seeks to address *intra-generational equity*, that is equity among present generations, and *inter-generational equity*, that is the equity between generations.¹⁰

Sustainable development is considered to bring together different and conflicting interests, but some argue that it is vague and imprecise. Indeed, the

⁶ Per Judge Christopher Weeramantry in *Hungary v Slovakia*, 1997 WL 1168556(I.C.J-1997)

⁷ Cullet P., *Differential Treatment in International Environmental Law and its Contribution to the Evolution of International Law*(Aldershot: Ashgate, 2003) page 8 to 9

⁸*The Brundtland Commission* was established by the United Nations in 1983 to address the problem of deterioration of natural resources. Its Mission was to unite countries to pursue sustainable development. It was officially dissolved in 1987 after releasing a report entitled *Our Common Future*, also known as the *Brundtland Report*. This report defined the meaning of the Sustainable Development.

⁹ Section 2 of EMCA Act Laws of Kenya

¹⁰Weiss, E.B, “In Fairness to future generations and Sustainable Development.” *American International Law Review*, Vol. 8 1992.

popularity and resilience of the concept of sustainable development is largely attributed to its *malleability*.¹¹

Premised on the above understanding this paper seeks to discuss the role that sustainable development has played in both protection of wildlife in wildlife conservancies and promoting economic activities in wildlife conservancies in Kenya. In essence, the author questions whether sustainable development has succeeded in promoting both the protection of wildlife and promoting economic activities in wildlife conservancies.

2.0 Historical perspective of Sustainable Development

Sustainable development is a concept that emerged in the context of a growing awareness of an imminent ecological crisis, as one of the driving forces of world history in the period around the end of the 20th century.¹²

In 1972 United Nations Conference on the Human Environment, in Stockholm, Sweden brought the industrialized and developing nations together to delineate the ‘rights’ of the human family to a healthy and productive environment. A series of such meetings followed, e.g. on the rights of people to adequate food, to sound housing, to safe water, to access to means of family planning. The recognition to revitalize humanity’s connection with nature led to the creation of global institutions within the UN system.¹³

At this point, the term ‘sustainable’ had yet to take off. The United National Conference on Sustainable Development provides an excellent, condensed history of the term. This provides that: *“The concept of sustainable development was originally synonymous with that of sustainability and is often*

¹¹ Ross, Andrea. “Modern Interpretations of Sustainable Development.” *Journal of Law and Society*, vol. 36, no. 1, 2009, page 32–54. JSTOR, www.jstor.org/stable/40206877.

¹²Jacobus A. Du Pisani Professor of History (2006) Sustainable development – historical roots of the concept, *Environmental Sciences*, 3:2, 83-96, DOI: 10.1080/15693430600688831

¹³<<http://www.uncsd2012.org/history.html>> accessed on 04/05/20

still used in that way. Both terms derive from the older forestry term “sustained yield”, which in turn a translation of the German term “nachhaltigerErtrag” is dating from 1713. According to different sources, the concept of sustainability in the sense of a balance between resource consumption and reproduction was however applied to forestry already in the 12th to 16th century. The history of the concept of sustainability is however much older. Already in 400 BCE, Aristotle referred to a Greek concept in talking about household economics. This Greek household concept differed from modern ones in that the household had to be self-sustaining at least to a certain extent and could not just be consumption-oriented.”¹⁴

The first time the term ‘sustainable’ was used “in the modern sense” was as a part of the Club of Rome’s publication in 1972. This came to the fore as a part of the publication of Limits to Growth, a report that described a particular state in which the global population would achieve balance or equilibrium. Describing the desirable “state of global equilibrium”, the authors used the word “sustainable”: “*We are searching for a model output that represents a world system that is: 1) sustainable without sudden and uncontrolled collapse; and 2) capable of satisfying the basic material requirements of all of its people.*”¹⁵

About fifteen years after the Club of Rome’s publication came another large step forward in this movement, at least according to most mainstream sources. The World Commission on Environment and Development (WCED) was tasked by the Secretary-General of the UN, in 1983, to “*re-examine critical environmental and development problems around the world and formulate realistic proposals to address them.*”¹⁶ This culminated in the 1987 *Brundtland Report*’s publication of “*Our Common Future*”, which established a suggested path for sustainable development on a global level and served to bring the concept of sustainability into the foreground on an international level.¹⁷

¹⁴<<https://rio20.un.org/resolutions>> accessed on 04/05/20

¹⁵<<https://rio20.un.org/resolutions>> accessed on 04/05/20

¹⁶<<http://yosemite.epa.gov/r10/oi.nsf/Sustainability/History>> accessed on 04/05/20

¹⁷Danny Stofleth, A Short History of Sustainable

A ground-breaking step came in 1992 with the first UN Conference on Environment and Development (UNCED) in Rio de Janeiro. At this conference, an agenda called Agenda 21 was adopted, which “*recognized each nation’s right to pursue social and economic progress and assigned to States the responsibility of adopting a model of sustainable development.*”¹⁸ The Secretary-General of UNCED regarded Agenda 21 as a “*program of action for a tolerable future for the human family and an initial step toward making sure the world will change into a more just, secure and wealthy habitat for all humanity.*”¹⁹

The focus had become broader. The emphasis was much more clearly on working towards a world where all peoples had access to the natural resources they needed to thrive. Another notable international protocol designed to guide the international community towards sustainable development, in this case particularly environmental, was the Kyoto Climate Agreement in 1997.²⁰ Its goal was to reduce the emissions of its signatories, with more emphasis placed on those developed countries which were responsible for most of the air pollution and its subsequent consequences. It might be noted that the US is the only developed country and one of the only two in general (the other being South Sudan) that has not ratified this protocol.²¹ From this time onwards, the Concept of Sustainable Development has been duly incorporated in various national legislations, regional legislation, international instruments and judicial decisions.

Development<<http://rethinkingprosperity.org/a-short-history-of-sustainable-development/>> accessed on 04/05/20

¹⁸<<https://rio20.un.org/resolutions>> accessed on 04/05/20

¹⁹<<http://www.sustainabledevelopmentinfo.com/history-of-sustainable-development/>> accessed on 04/05/20

²⁰Danny Stofleth, A Short History of Sustainable Development<<http://rethinkingprosperity.org/a-short-history-of-sustainable-development/>> accessed on 05/05/20

²¹Ibid No.20

3.0 Legislating on the Concept of Sustainable Development in Kenya

There exists a robust legal framework in Kenya in support of the concept of sustainable development. This illustrates the importance of the concept of sustainable development. Below a succinct analysis of the legal framework providing for the concept of sustainable development in Kenya:

a) The Constitution of Kenya 2010

The Constitution of Kenya 2010 is the supreme source of law in Kenya in the sense that all written and unwritten laws must be consistent with its express provisions and principles. In effect, no law may be enacted or applied to violate or conflict with any of the provisions of the Constitution. Statute law provides means by which obligations imposed thereunder are effectively enforced. Otherwise, the Constitution would amount to no more than an instrument of mere declarations. Its supremacy is underscored in Article 2(1). Further, Article 2(4) expounds on the supremacy of Constitution by asserting that any law or customary law that is contrary to the Constitution, is void to that extent in Kenya.

Article 10(2) of the Constitution of Kenya 2010 considers sustainable development to be one of the national values and principles of governance. On this basis and in accordance with Article 10(1) of the Constitution of Kenya all State organs, State officers, public officers and all persons are bound by the concept of sustainable development whenever they apply or interpret the Constitution; enacts, applies or interprets any law; or makes or implements public policy decisions.

The import of this provision is that the Constitution of Kenya 2010 imposes an onerous duty upon all citizens' especially state officers or public officers, to uphold religiously the concept of sustainable development. This includes government agencies like Kenya Wildlife Service (KWS) which are tasked with protecting which is tasked with protecting and conserving wildlife in wildlife conservancies and promoting economic activities in wildlife

conservancies. This is with the sole purpose of achieving sustainable wildlife conservation.²²

The centrality of sustainable development is perhaps more explicit when one looks at Article 69(1) of the Constitution of Kenya 2010 which provides that the State shall ensure the sustainable exploitation, utilization, management and conservation of the environment and natural resources and ensure equitable sharing of the accruing benefits.

The Constitution thus takes an ecological perspective to sustainable development; a perspective geared towards the protection of the environment which includes wildlife for ecological reasons as well as for the satisfaction of human needs.²³

The Constitution of Kenya 2010 under Article 69(2) implicitly imposes a duty on all persons in Kenya to cooperate with state organs like Kenya Wildlife Service and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources. This presupposes that ensuring there is sustainable development in Kenya remains one of the main objectives of the Constitution.

b) Environmental Management and Co-Ordination Act No. 8 of 1999(EMCA)

This is a statute whose main purpose is to protect the environment. In this regards under Section 2, it defines sustainable development as “*development that meets the needs of the present generation without compromising the ability of future generations to meet their needs by maintaining the carrying capacity of the supporting ecosystems.*”²⁴

Under Section 3(2A), EMCA imposes a duty on all persons in Kenya to cooperate with state organs and other persons to protect and conserve the

²²Section 7 of Wildlife Conservation and Management Act No. 47 of 2013

²³Article 69 (1) Constitution of Kenya 2010

²⁴ Section 2 of EMCA Act Laws of Kenya

environment and ensure ecologically sustainable development and use of natural resources. Section 3 (5) of EMCA outlines principles of sustainable development that ought to guide the Environment and Land Court in exercising the jurisdiction conferred upon it.

The National Environment Management Authority as established under section 7 of EMCA, is required under Section 63 of EMCA to issue an environmental impact assessment license only on such terms and conditions as may be appropriate and necessary to facilitate sustainable development and sound environmental management. Under Section 129(3) of EMCA, the National Environmental Tribunal is empowered to make orders to enhance the principles of sustainable development.

c) International Legal Framework

By dint of Article 2(5) and 2(6) of the Constitution of Kenya 2010, all International Conventions that have been ratified by Kenya now form part of Kenyan law. However, the International Conventions must be ratified in accordance with the Treaty Making and Ratification Act No. 45 of 2012 to be part of Kenya legal framework. Succinctly stated, Part III of Cap No. 45 of 2012 outlines the procedure which ought to be adhered to before ratification of a treaty. This procedure which leads to the ratification of a treaty must be adhered to religiously. This includes approval by the Cabinet and the National Assembly as provided by Section 7 and 8 of Cap No. 45 of 2012 respectively. In essence, these provisions of the Constitution provides a means by which international law becomes part of the Kenya legal framework.

Sustainable development has, over the last 30 years, received wide support in a vast array of non-binding international legal documents. It finds expression in countless Declarations of states, resolutions of international organizations, programmes of action, and codes of conduct.²⁵

²⁵ For an overview see V. Barral, 'Le développement durable en droit international: Essai sur les incidences juridiques d'un concept évolutif' (PhD thesis on file at the EUI, Florence).

To the extent that these various instruments are not recognized as among the formal sources of international law, they are incapable, in and of themselves, of giving rise to a valid legal rule relating to sustainable development, irrespective of the legal strength of their formulation.

For example; Agenda 21 the non-binding programme of action adopted by the Rio Conference, refers in its preamble to the need for ‘*global partnership for sustainable development*,’ and most its provisions are intended to promote the concept, whose implementation is monitored by the Commission on Sustainable Development.²⁶ Sustainable development also finds expression in several international treaties. For example:

Sustainable development informs much of the *Rio Declaration*, as well as the *Conventions on Climate Change and Biological Diversity*, and it is central to the elaboration of global environmental responsibility by these and other instruments such as Kyoto Protocol which Kenya has ratified.²⁷

Regionally, Kenya has ratified The Treaty for the Establishment of the East African Community 1999 which envisages development of programs and policies in a diverse range of areas, including the environmental field and economic activities. This is manifested by Article 5(3) stipulates that: For purposes set out in paragraph 1 of this Article and as subsequently provided in particular provisions of this Treaty, the community shall ensure:

- a) The attainment of *sustainable growth and development* of the Partner States by the promotion of a more balanced and harmonious development of the Partner states.
- b) The promotion of *sustainable utilization* of natural resources of the partner states and the taking of measures that would, in turn, raise

²⁶ UNGA Res 47/191(1992), See Osborn and Bigg, *Earth Summit II; Outcomes and Analysis* (London 1998) 608

²⁷ See 1992 Convention on Climate Change, Article 3; 1992 Convention on Biological Diversity, Articles 8 and 10; 1994 Convention to Combat Desertification, Articles 4 and 5

the standard of living and improve the quality of life of their populations.

All these treaties which Kenya has ratified on the concept of sustainable development bind Kenya. Sustainable development is included in over 300 conventions, and a brief survey of these is revealing from the point of view of the categories of conventions at stake, the location of the proposition relating to sustainable development, and the function attributed to it.²⁸

4.0 Analyzing the role of the concept of sustainable development: Conflict or Synergy in Promoting both Protection of Wildlife and Economic Development in Wildlife Conservancies in Kenya

It is not in doubt that there have been much-publicized disputes premised on the need to protect wildlife conservancies and on the other hand the need to promote economic growth through undertaking economic activities in wildlife conservancies.

More often than not, these disputes are between the general public represented by environmentalist activists and/or lobby groups and the government represented by its various agencies. These disputes have escalated to the corridors of justice where neither of the parties wishes to abdicate their position. In this regard, cases have been filed either at the Environment and Land Court or National Environment Tribunal (NET). When faced with such disputes, the courts or tribunal have overtime incorporated the concept of sustainable development in their decisions. The examples of such disputes include but not limited to;

The government mega project of Standard Gauge Railway (SGR) which passes through the Nairobi National Park a wildlife conservancy. This was highly opposed by various conservationists group led by the Friends of Nairobi

²⁸Virginie Barral, Sustainable Development in International Law: Nature ^[1]and Operation of an Evolutive Legal Norm, *European Journal of International Law*, Volume 23, Issue 2, May 2012, Pages 377–400, <https://doi.org/10.1093/ejil/chs016>

National Park group and the Kenya Coalition for Wildlife Conservation and Management group.

The conservationists' groups' arguments were largely premised on the need to protect wildlife in the Nairobi National Park as a wildlife conservancy. They argued that construction of Standard Gauge Railway (SGR) through the Nairobi National Park would affect the ecology of the park, endangering the wildlife and their natural habitats.²⁹ The activists insisted that the construction of SGR through the park would lead to the Nairobi National Park as wildlife Conservancy being irreparably damaged.³⁰ The activists held demonstrations as they demanded that the construction of the Standard Gauge Railway be rerouted around Nairobi National Park. To put this into perspective one of the activists one Patricia Heaths was quoted saying "*This is a tiny park. It's an absolute jewel to the Nairobi citizens and all of Kenya. It is crowded with guests. Everybody who comes for safari, their first stop is Nairobi National Park before they go to the Mara and all those places, and it's a disaster if they take it away.*"³¹

The government on the other led by his Excellency the President Uhuru Muigai Kenyatta advocated for the need to construct the Standard Gauge Railway (SGR) through Nairobi National Park for economic reasons. This was supported by the National assembly which clandestinely passed the Prevention of Torture Bill, 2017, an amendment to the Environmental Management Act, which had the effect of reversing all stop orders previously issued by the National Environment Tribunal (NET).³² This vividly illustrates the existence of the conflicting interests of the need to protect wildlife in wildlife

²⁹<<https://www.voanews.com/africa/environmentalists-kenya-protest-china-backed-railway-construction>> accessed on 10/05/20

³⁰<<https://www.nation.co.ke/oped/opinion/SGR-to-irreparably-damage-Nairobi-national-park/440808-4336360-r7w1d5z/index.html>> accessed on 10/05/20

³¹<<https://www.voanews.com/africa/environmentalists-kenya-protest-china-backed-railway-construction>> accessed on 10/05/20

³²<<https://www.nation.co.ke/oped/opinion/SGR-to-irreparably-damage-Nairobi-national-park/440808-4336360-r7w1d5z/index.html>> accessed on 10/05/20

conservancies and promoting economic activities in wildlife conservancies in Kenya.

Another example is the recently proposed construction of a hotel at the Nairobi National Park which was to have an eco-lodge, a high-end restaurant and an amphitheatre. This was to be undertaken by the Kenya Wildlife Service a government Agent.³³ Again this has been highly opposed by various lobby groups led by Friends of Nairobi National Park group. Edwin Kiraki, a conservation enthusiast, was quoted saying *“Building a multimillion shilling hotel in Nairobi National Park will destroy wildlife ecological spaces. It will reduce wildlife habitats thus threatening wildlife green spaces. Green spaces should be respected.”*³⁴

The opposition to the construction of the hotel was successful. The government through the Tourism and Wildlife ministry directed the Kenya Wildlife Service (KWS) to suspend the plans to build a hotel inside Nairobi National Park until after a public participation forum was held.

Ahmed Elmawi, the ministry’s head of communications stated that *“The public participation shall be extended for the public to raise their concerns or support so that analysis and improvement of the plan can be undertaken for the public interest.”*³⁵

Again this is proof of the divergent interests that exists where one side advocates for the need to protect wildlife in wildlife conservancies and the other advocates for promoting economic activities in wildlife conservancies in Kenya.

³³Kenya Wildlife Service- established under Section 6 of Wildlife Conservation and Management Act No. 47

³⁴<<https://www.nation.co.ke/news/Lobbies-oppose-KWS-plan-for-hotels-in-park/1056-5529852-76uf7k/index.html>> accessed on 10/05/20

³⁵<<https://www.pd.co.ke/lifestyle/kenya-wildlife-service-halts-construction-of-hotel-in-nairobi-park-35842/>> accessed on 10/05/20

Recently also there was the illegal construction of an amusement park at the Hells Gate National Park. Tourism Cabinet Secretary Najib Balala suspended the said construction of the Hells Gate amusement park.³⁶ This clearly shows the existence of these two divergent interests; the need to protect wildlife in wildlife conservancies versus promoting economic activities in wildlife conservancies in Kenya.

Lastly, in the case of; *Wildlife Director (Kenya) v. Kenya Wildlife Services & 4 others; Kenya Wildlife Services (Defendant); National Environment Management Authority (Interested Party) [2020] eKLR*.³⁷ Wildlife Director (Kenya) had brought a claim against Kenya Wildlife Services for organizing events at Hell's Gate National Park. This included the World Rally Championship and Koroga Festival that were to be held inside Hell's Gate National Park.

The court ruled that it did not have jurisdiction to hear the petition. In making his ruling, in this case, Justice John Mutungi verbatim, stated: "*The present matter though coached as a constitutional petition in real sense is a Wildlife Conservation and Management matter which the Wildlife Conservation and Management Act read together with the Environmental Management and Co-ordination Act, 1999 have provided adequate dispute resolution mechanisms which the Petitioner ought to have invoked rather than come to this Court.*" However, despite the ruling Dr Paula Kahumbu, chief executive officer at Wildlife Director (Kenya) stated that "*Success is not winning a court case. Success is a thriving wildlife. It is a very sad day for Kenya and lovers of wildlife that the agency responsible for the conservation of wildlife has accepted Sh700, 000 even though the event imperils critically endangered species in an already degraded park.*"³⁸

³⁶ <<https://www.the-star.co.ke/news/2018-04-27-photos-illegal-construction-of-amusement-park-ongoing-at-hells-gate/>> accessed on 10/05/20

³⁷ ELC Petition No. 3 of 2020

³⁸ <<https://mobile.nation.co.ke/news/Court-throws-out-Koroga-case-Hell-s-Gate-Paula-Kahumbu/1950946-5453670-gu5htr/index.html>> accessed on 10/05/20

It is crystal clear from the above statement by Dr Paula Kahumbu, that in the dispute presented to the court the divergent interests were the need to protect wildlife in wildlife conservancies versus promoting economic activities in wildlife conservancies in Kenya. The concept of sustainable development has a seminal role to play in reconciling these two divergent interests i.e the need to protect wildlife in wildlife conservancies versus promoting economic activities in wildlife conservancies in Kenya. Countries now have agreed that to reconcile these two divergent interests the concept of sustainable development³⁹ is seminal.⁴⁰The concept of sustainable development succinctly stated envisions a situation where there is an equilibrium between the protection of the environment through the protection of wildlife and promoting economic growth through economic activities.

In essence, the concept posits; in the realization of equilibrium between wildlife protection in wildlife conservancies and economic growth through economic activities in wildlife conservancies, then we can realize *development that meets the needs of the present without compromising the ability of future generations to meet their own needs.*⁴¹

The main objective of promoting economic activities in wildlife conservancies is to promote economic growth. On the other hand, there is the need to protect wildlife in wildlife conservancies. The question then arises as to whether the concept of sustainable development, creates conflict or synergy between economic development in wildlife conservancies and protection of wildlife in

³⁹ Sustainable development is considered to be development that promotes prosperity and economic opportunity, greater social well-being, and protection of the environment like wildlife offers the best path forward for improving the lives of people everywhere.

⁴⁰United Nations, 'What We Do: Promote Sustainable Development,' available at <<http://www.un.org/en/s.s/what-wedo/promote-sustainable-development/index.html> > accessed on 10/05/20

⁴¹The *Brundtland Commission* was established by the United Nations in 1983 to address the problem of deterioration of natural resources. Its Mission was to unite countries to pursue sustainable development. It was officially dissolved in 1987 after releasing a report entitled *Our Common Future*, also known as the *Brundtland Report*. This report defined the meaning of the Sustainable Development.

wildlife conservancies in Kenya. It is generally accepted that the concept of sustainable development ought to create a synergy between these two varying interests.

This was rightly pointed out in the case of *Hungary v. Slovakia, 1997*⁴² sustainable development as a concept was judicially interpreted. In this particular case, *Judge Weeramantry* rightly argued that the concept of sustainable development is one that has received worldwide acceptance not only by the developing states but also by the developed countries, as it reaffirms that there must be both development and environmental protection and that neither of these rights can be neglected at the expense of the other, thus making it part of modern international law. He considered sustainable development to be a '*principle with normative value*' demanding a balance between development and environmental protection.

However, it is easier said than done that the concept of sustainable development ought to create a synergy between the need to protect wildlife in wildlife conservancies versus promoting economic activities in wildlife conservancies in Kenya. This because the interpretation of the concept of sustainable development has mutated over time. This has given rise to various interpretations of the concept of sustainable development. These various interpretations of the concept of sustainable development work within the *Brundtland* formula but vary in regards to the emphasis placed on each of the components of sustainable development: economy, environment, society.⁴³

Disparities also exist about the nature of human needs now, the future and technology's role in meeting those needs. When differing values combine with these different definitions, sustainable development is construed as

⁴² WL 1168556 (I.C.J-1997) (Gabcikovo-Nagymoros Project (Hungary-Slovakia))

⁴³ Ross, Andrea. "Modern Interpretations of Sustainable Development." *Journal of Law and Society*, vol. 36, no. 1, 2009, page 32–54. JSTOR, www.jstor.org/stable/40206877.

legitimizing 'business-as-usual' patterns of economic growth or, at the other extreme, requiring a fundamental reworking of the socio-economic order.⁴⁴

In the United Kingdom for example, as in most countries, national and business interpretations and strategies for sustainable development have underpinned by what is commonly referred to as 'weak sustainability'.⁴⁵ Weaker interpretations of sustainable development focus more on development and are indifferent to the form in which capital stock is passed on.⁴⁶

Pearce,⁴⁷ notes that on the weak sustainability interpretation of sustainable development there is no special place for the environment. The environment is simply another form of capital.⁴⁸ This is reflected in the description of sustainable development as a trade-off between the environment and economic development prominent in the early 1990s'.⁴⁹

Later interpretations consider the three components of the economy, environment, and society as interdependent and mutually reinforcing pillars, yet still, favour high economic growth.⁵⁰ These approaches are based on the premise that technology and international trade and investment will ensure there are always enough resources to meet cultural or human carrying

⁴⁴ J. Alder and D. Wilkinson, *Environmental Law and Ethics* (1999) 141; A. Dobson, *Green Political Thought* (1995, 2nd Edition) Chapter 3

⁴⁵ A. Blowers, 'Planning a Sustainable Future: Problems, Principles and Prospects' (1992) 61 *Town and Country Planning*

⁴⁶ D. Pearce, *Blueprint 3 - Measuring sustainable development* (1993) at page 15.

⁴⁷ *Ibid* No.46

⁴⁸ The weak sustainability interpretation of sustainable development still requires that the depletion of natural resources that are in fixed supply - non-renewable resources - should be accompanied by investment in substitute sources (*id.* at pp. 15-16). For a slightly stronger view, see J. Bowers, *Sustainability and Environmental Economics - An Alternative Text* (1997) at 194.

⁴⁹ See; *Sustainable Development: The UK Strategy*, (1994; Cm. 2426) Principle 4; Rio Declaration on Environment and Development UN Doc. A/CONF.151/26 (Vol. I) (1992).

⁵⁰ DETR, *A better quality of life: A strategy for sustainable development for the United Kingdom* (1999; Cm. 4345); and Programme of Implementation of the World Summit on Sustainable Development, Johannesburg UN Doc. A/CONF. 199/20(2002)

capacity.⁵¹ Sustainable Development is also linked to the right to development, human rights and good governance when it is described as sustainable human development.⁵²

This means that interpretation of the concept of sustainable development is key in a discourse of determining the role the concept of sustainable development. This paper hence posits that the Environment and Land Court and National Environment Tribunal (NET) have a seminal role to play for the realization of the objective of the concept of sustainable development.

This is because when there is a dispute based on these divergent interests,⁵³ the dispute is resolved in these two forums as they possess the requisite jurisdiction to resolve such a dispute. It's imperative then that the Environment and Land Court and National Environment Tribunal (NET), adopts an interpretation of the concept of sustainable development suitable to promote synergy between these divergent interests.⁵⁴

In doing so the main objective of creating an equilibrium between protection of the environment through the protection of wildlife in wildlife conservancies and promoting economic growth through economic activities in wildlife conservancies can be realized through the concept of sustainable development. This paper recommends that; to give effect to the concept of sustainable development it ought to be incorporated in the decision-making process of the authorities tasked with conservation and management of wildlife. The most effective and legal way to incorporate sustainable development in the decision-making process of the authorities tasked with conservation and management of wildlife is at the public participation stage. At this juncture,

⁵¹ Ross, Andrea. "Modern Interpretations of Sustainable Development." *Journal of Law and Society*, vol. 36, no. 1, 2009, page 32–54. JSTOR, www.jstor.org/stable/40206877.

⁵²Kariuki Muigua, Didi Wamukoya, and Francis Kariuki, *Natural Resources and Environmental Justice in Kenya* page 18

⁵³ The divergent interest of : the need to protect wildlife in wildlife conservancies versus promoting economic activities in wildlife conservancies in Kenya,

⁵⁴ *Ibid* No.53

parties have a chance to implement sustainable development goals by mutually arriving at a decision that meets the needs of the present without compromising the ability of future generations to meet their own needs.

In essence, where the guiding principle is sustainable development during the public participation stage, then the final mutual decision arrived at by the parties, can be a decision that; promotes economic activities in wildlife conservancies where necessary and at the same time one that protects wildlife in wildlife conservancies.

The legal basis of public participation as a prerequisite in wildlife conservancy and management decision-making process is the Constitution of Kenya 2010, Wildlife Conservation and Management Act No. 47 of 2013 and Environmental Management and Co-Ordination Act No. 8 of 1999 (EMCA). Under Article 10 of the Constitution, one of the national values and principles of governance that ought to guide all state organs, state officers, public officers and all persons when making or implementing public policy decisions is public participation.

Under Section 4 of the Wildlife Conservation and Management Act,⁵⁵ public participation is one of the guiding principles that ought to be adopted in the conservation and management of wildlife. This is further buttressed by provisions of Section 5 (5) of Wildlife Conservation and Management Act No. 47 of 2013, which requires the Cabinet Secretary when formulating a national wildlife conservation and management strategy to consult the public in accordance with the Fourth Schedule of the Act.

Further, Section 5 (c) (a) of the EMCA Act No. 8 of 1999, requires the Cabinet Secretary to provide evidence of public participation in the formulation of the policy and the environmental action plan. The aforesaid provisions of the law assert the importance of public participation.

⁵⁵ Act No. 47 of 2013

Lastly, this paper recommends that it's imperative that the Environment and Land Court and National Environment Tribunal, when faced with disputes concerning wildlife conservancy and management, to adopt the principle of sustainable development in their decision making.

In so doing, the Environment and Land Court and National Environment Tribunal (NET) will be exercising their requisite jurisdiction within the provisions of EMCA Act No. 8 of 1999 . Section 3 (5) of the EMCA Act No. 8 of 1999 which requires the Environment and Land Court in the exercise of its jurisdiction to be guided by the principle of sustainable development.

Further, the National Environment Management Authority as established under section 7 of EMCA, is required under Section 63 of EMCA to issue an environmental impact assessment license only on such terms and conditions as may be appropriate and necessary to facilitate sustainable development and sound environmental management. Under Section 129(3) of EMCA, the National Environmental Tribunal is empowered to make orders to enhance the principles of sustainable development.

The analysis above shows the importance of public participation and how it provides an avenue, to incorporate sustainable development in wildlife conservancy and management decision-making process. This to a great extent, if done in good faith and being guided by the tenets of sustainable development would go long way in addressing creating a convergence of the divergent interests⁵⁶.

5.0 Conclusion

Sustainable development is vital in reconciling the divergent interest⁵⁷ that frequently manifests themselves in wildlife conservancies in Kenya. If the concept of sustainable development is adopted as envisaged by *the Brundtland*

⁵⁶ The divergent interest of : the need to protect wildlife in wildlife conservancies versus promoting economic activities in wildlife conservancies in Kenya,

⁵⁷ The divergent interest of : the need to protect wildlife in wildlife conservancies versus promoting economic activities in wildlife conservancies in Kenya,

*Commission*⁵⁸ then it would go a long way in creating a synergy between protection of the environment through the protection of wildlife in wildlife conservancies and promoting economic growth through economic activities in wildlife conservancies.

All authorities e.g Kenya Wildlife Service (KWS), tasked with the onerous role of managing wildlife conservancies or sanctuaries in Kenya, ought to adopt the concept of sustainable development in their decision making. This would reduce disputes associated with the divergent interests⁵⁹ that frequently manifest themselves in wildlife conservancies in Kenya. In the end, this paper posits that if the concept of sustainable development is adopted as envisioned by *the Brundtland Commission*, it can be a panacea to the disputes that often manifest themselves in wildlife conservancies.

⁵⁸*The Brundtland Commission* was established by the United Nations in 1983 to address the problem of deterioration of natural resources. Its Mission was to unite countries to pursue sustainable development. It was officially dissolved in 1987 after releasing a report entitled *Our Common Future*, also known as the *Brundtland Report*. This report defined the meaning of the Sustainable Development.

⁵⁹ The divergent interest of : the need to protect wildlife in wildlife conservancies versus promoting economic activities in wildlife conservancies in Kenya,

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