

Enhancing Public Participation for Effective Management and Protection of Environmental Resources in Kenya

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Abstract

The principle of public participation is one of the principles of governance enshrined in Article 10 Constitution of Kenya 2010.¹ Public participation in environmental decision-making processes is a vital requirement. This is especially so when it comes to Environmental Impact Assessments. Comprehensive and transparent involvement of the public is advocated for by both national and international laws. Public participation is necessary in identifying, addressing and mitigating potential environmental risks associated with various projects.

As jurisprudence has shown overtime time and buttressed by seminal court decisions, any project undertaken without effective public participation especially one that stands to impact on the environment is null and void ab initio. The right to a clean and healthy environment is one of the rights guaranteed under the Constitution of Kenya 2010.²

Premised on the foregoing, this paper therefore delimits what constitutes meaningful public participation that can lead to realization of effective management and protection of environmental resources in Kenya. In doing so, this paper defines the elements of the principle of public participation, the importance of the principle of public participation, gives a critique of the barriers towards achieving effective public participation and lastly provides recommendations of how the barriers can be reduced.

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¹ Article 10 of the Constitution of Kenya 2010

² Article 40 of the Constitution of Kenya 2010

1.0 Introduction

All human activities revolve around the environment and as such these activities have the power to alter the planet irreversibly. The basis of this assertion can be derived from what constitutes environment. Perhaps the simplest and most memorable definition of "environment" is that given by *Albert Einstein*, who once said, "...the environment is everything that isn't me."³ The only problem with adopting this definition is that there will be very little activity which does not have an "environmental" impact.⁴ This illustrates that defining environment is challenging due to the scope of what can be regarded as part of the environment.

A succinct definition of environment is that it is a combination of elements whose complex interrelationships make up the settings, the surroundings and the conditions of life of the individual and society as they are and as they are felt. (EC Council Regulation 1872/84, Action by the Community Relating to the Environment, 1984.)⁵ The term environment has also been defined by the International Court Justice in *the Legality of the Threat or use of Nuclear Weapons Case* to include, "... not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn."⁶

A legal definition of the term *environment* in Kenya is provided by Section 2 of the Environmental Management and Co-ordination Act,⁷ (hereinafter EMCA) which states that: "*Environment*" includes the physical factors of the surroundings of human beings including land, water, atmosphere, climate, sound, odour, taste, the biological factors of animals and plants and the social factor of aesthetics and includes both the natural and the built environment"

³ <https://www.brainyquote.com/quotes/albert_einstein_165189> accessed on 31/05/21

⁴ Justine Thornton & Silas Beckwith, Environmental Law (Sweet and Maxwell 1997) pg.2

⁵ Mark Stallworthy, Environmental Law 1st Edition ,pg.2

⁶ ICJ Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, I.C.J. Reports 1996, p 241, para 29

⁷ Act No. 8 of 1999

Environmental resources are “any materials or services from the environment that are valuable to the society.”⁸ They include natural resources among other things.

On the other hand, public participation can succinctly be defined as the active involvement of members of a community in decisions which affect them.⁹ A statutory definition of public participation is offered by the Wildlife Conservation and Management Act No. 47 of 2013 which under Section 3(1) defines *public participation* to mean; *active involvement by the citizenry in decision making processes through, inter alia, use of the national media, relevant consultative mechanisms and public hearings.*

In essence, then public participation involves the dissemination of information and invitation to the public to participate in the decision-making process.¹⁰ The principle of public participation operates as a direct democracy where citizens influence and share their ideas on the exercise of public authority.¹¹ It lies on the notion that every citizen has a right to be informed on matters that affect them and also accorded an opportunity to express their views.¹²

Principle 10 of the Rio Declaration also offers a lengthy elucidation of what constitutes public participation. It states that; “*Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their*

⁸Encyclopaedia, ‘Environmental Resources’

<<https://www.encyclopedia.com/environment/encyclopedias-almanacs-transcripts-and-maps/environmental-resources>> accessed on 31/05/21

⁹Doctors for Life International v The Speaker National Assembly and Others (2006) (CCT12/05) (ZACC 11)

¹⁰ Ibid No.9

¹¹Dominic Steiger, ‘A Constitutional Theory of Imperative Participation; Delegated Rulemaking, Citizen’s Participation and the Separation of Powers Doctrine,’ (2015) 79 *Alberta Law Review* 3

¹² Ibid No.11

communities, and the opportunity to participate in decision-making processes... ”¹³

The principle of public participation places an obligation upon States to provide effective access to judicial and administrative proceedings, including redress and remedy.¹⁴ This is to ensure the protection of the right to public participation. Public participation empowers citizens as they are able to hold the government accountable for the decisions made.¹⁵ As a result of this principle of public participation, the government is able to make informed decisions while taking into account the needs of the stakeholders and the society at large.¹⁶

The importance of public participation was emphasized by the Court of Appeal¹⁷ where it stated that, “...*The issue of public participation is of immense significance considering the primacy it has been given in the supreme law of this country and in relevant statutes relating to institutions that touch on the lives of the people. The Constitution in Article 10 which binds all state organs, state officers, public officers and all persons in the discharge of public functions, highlights public participation as one of the ideas and aspirations of our democratic nation... public participation ought to be real and not illusory and ought not to be treated as a mere formality for the purposes of fulfilment of the Constitutional dictates.*”¹⁸

¹³UN Commission on Human Rights, Human rights and the environment, 9 March 1992, principle 10

¹⁴UN Commission on Human Rights, Human rights and the environment, 9 March 1992, principle 10

¹⁵ ICJ Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, I.C.J. Reports 1996, p 241

¹⁶Ibid No.14

¹⁷Kiambu County Government & 3 others v Robert N. Gakuru &Others [2017] eKLR.

¹⁸Ibid No.17

2.0 A Case for meaningful Public Participation in a bid to realize Effective Management and Protection of Environmental Resources in Kenya

In a discourse to realize effective management and protection of environmental resources in Kenya, meaningful public participation is at the centre. In-limine, Article 10 (2) (a) of the Constitution of Kenya 2010 captures the *principle of public participation* as one of the *national values and principles of governance*.

In essence, the *principle of public participation* binds all state organs, state officers, public officers and all persons in; interpreting and applying the Constitution, enacting, interpreting and applying laws and lastly making and implementing public policy decisions.¹⁹

a) Tracing the interface between public participation and protection of environmental resources.

The interface between public participation and protection of environmental resources is demonstrated by the explicit requirement of public participation by law in matters directly relating to environment. A brief review of various laws buttresses these assertions.

The Constitution of Kenya 2010 acknowledges the importance of the environment as well as the need to protect and conserve it. It connotes, *“respectful of the environment, which is our heritage, and determined to sustain it for the benefit of future generations;”*²⁰ At the core of the national values and principles of governance enshrined under the Constitution of Kenya, 2010 is the participation of the people.²¹ Such principles bind all persons and state organs whenever they enact, apply or interpret any law.²² This therefore means that the Constitution guarantees the citizens the right to take part in decision making processes. Among such decisions, is the decision regarding activities that impact on environment. Public participation and environmental protection go hand in hand.

¹⁹ Article 10(1) of the Constitution of Kenya 2010

²⁰ Constitution of Kenya 2010, preamble para 4.

²¹ Article 10(2)(a) of the Constitution of Kenya 2010

²² Article 10(1) of the Constitution of Kenya 2010

Participation of the people is one among multiple ways of attaining sustainable development; which forms part of the principles and national values governing the Constitution.²³ Public participation also ensures that everyone gets involved in the protection and conservation of the environment, a requirement introduced by Article 69 (1) (d) and (2) of the Constitution of Kenya 2010. It is not only an expression of the sovereignty of the people as articulated under Article 1 of the Constitution, but it is also one of the corner stones of our new democracy.²⁴

Statutory provisions to a great extent also create a requirement of public participation in protection of environmental resources. Section 3(5) (a) of the EMCA requires the Environment and Land Court in exercising the jurisdiction conferred upon it to be guided by the principle of public participation in the development of policies.

The Cabinet secretary in charge of matters environment is required under Section 5 (ca) of EMCA to provide evidence of public participation in the formulation of the policy and the environmental action plan. EMCA, establishes the National Environment Management Authority (hereinafter NEMA) under Section 7, clothed with powers and authority to protect the environment. As such it's imperative and informative that one of the object and function of NEMA is to undertake, in co-operation with relevant lead agencies, programmes intended to enhance environmental education, *public awareness and public participation*.

EMCA subsidiary regulations²⁵ which provide for Environmental (Impact Assessment and Audit) Regulations, 2003 under rule 17 provide for the requirement of public participation in conducting an environmental impact assessment. Verbatim, this regulation provide that during the process of conducting an environmental impact assessment study, the proponent shall in consultation with the NEMA, seek the views of persons who may be affected by the project.

²³Article 10(2)(d) of the Constitution of Kenya 2010

²⁴Mui Coal Basin Local Community & 15 others v Permanent Secretary of Energy & 17 others [2015] eKLR.

²⁵ Act No. 8 of 1999

As such public participation is a condition precedent to the issuance of an Environmental Impact Assessment Licence.²⁶ Section 4 (b) of the Wildlife Conservation and Management Act No. 47 of 2013 provides that conservation and management of wildlife shall entail effective public participation as one of the guiding principles.

Lastly, the Forest Conservation and Management Act No. 34 of 2016 under section 4(b) provides for public participation and community involvement in the management of forests as one of the guiding principles. The community likely to be affected by certain operations must be engaged in deciding whether such an operation will be carried out or not. The rising need for enhancing public participation in the protection and management of environmental resources has been occasioned by the adverse effects of climate change and environmental degradation.²⁷

b) Delimiting what constitutes meaningful public participation as a means of ensuring effective management and protection of environmental resources

The Constitution of Kenya 2010 envisages a meaningful and active public participation.²⁸ It requires the citizens to be engaged at every stage of the decision-making process.²⁹ It also requires the participation to be comprehensive, timely and also include a mechanism through which citizens' views can be aired and addressed.³⁰ Public participation cements a critical and foundational principle of the Constitution sovereignty of the

²⁶Maria Hadjimichael, 'Forming Perceptions and the Limits to Public Participation on Ocean Commons: Evidence from a Citizens Jury Workshop,' (2017) 11 *International Journal of the Commons* 200.

²⁷ Brian Clarke, 'Improving Public Participation in Environmental Impact Assessment,' (1994) 20 *Built Environment Journal* 294.

²⁸Elias Kipyego and Joshua Wandare, 'Public Participation and the Budgeting Process within the County Government of Nandi, Kenya,' (2017) 2 *European Journal of Management and Marketing Studies* 56.

²⁹Ibid No. 28

³⁰Elias Kipyego and Joshua Wandare, 'Public Participation and the Budgeting Process within the County Government of Nandi, Kenya,' (2017) 2 *European Journal of Management and Marketing Studies* 56

people. It is an ongoing obligation placed on the government through the process of Environmental Impact Assessment.³¹

The courts overtime have deliberately delimited what constitutes meaningful public participation. In this regard, Justice Joel Ngugi in the case of; *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others*³² clearly epitomized the elements of public participation as follows; *Firstly*, the government agency or public official is mandated to craft the modalities of the participation.³³ Here, they are required to fashion the participation in a manner that is consistent with the subject matter. When crafting the modalities, they are supposed to take into account the quantity and quality of the governed to participate in their own governance.

Secondly, the principle of public participation calls for innovation and malleability depending on the subject matter, culture and logistical constraints. This means that the courts can neither prescribe how public participation is to be carried out nor can they use a litmus test to determine whether the same has been achieved or not. The only test that can be used by the courts to determine whether public participation has been carried out is that of effectiveness.³⁴

Thirdly, the principle of public participation requires access to and dissemination of the relevant information. This is important as it helps the members of the community to make informed decisions.³⁵

Fourthly, the principle does not require that everyone should give their view on an issue of environmental governance. What it requires is the evidence of intentional inclusivity and diversity. Thus, any clear intention of keeping out

³¹Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others [2015] eKLR.

³²Constitutional Petition Nos 305 of 2012, 34 of 2013 & 12 of 2014(Formerly Nairobi Constitutional Petition 43 of 2014) (Consolidated)

³³Ibid No. 32, para 97(a).

³⁴Mui (n 32) para 97(b).

³⁵Mui (n 32) para 97(c).

the relevant stakeholders renders such public participation illegal and ineffective *ab initio*. While considering the issue of inclusivity, the government agency or public official must take note of the principle of subsidiarity; which connotes that those mostly affected by an action must have a bigger say in such an action. That their views must be more deliberately sought and taken into account.³⁶

Fifthly, the principle of public participation does not compel the government agency or public official to take as dispositive, the views expressed by the public. Rather, it places a duty on the government agency or public official to take into consideration and in good faith all the views expressed. On this element, the court added that; *“The government agency or public official cannot merely be going through the motions or engaging in democratic theatre so as to tick the Constitutional box.”*³⁷

Lastly, the principle of public participation is *“not meant to usurp the technical or democratic role of the office holders but to cross-fertilize and enrich their views with the views of those who will be most affected by the decision or policy at hand.”*³⁸

In conclusion, the court stated that in order to determine whether public participation was adequately carried out for a certain project, it is important to consider factors such as: *“the bona fides of the public actor, the nature of the subject matter, the length and quality of engagement and the number of mechanisms used to reach as many people as possible.”*³⁹

Sachs J, in the case of; *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others*⁴⁰ added that when it comes to the principle of public participation, what matters at the end of the day is that a reasonable opportunity has been accorded to members of the public and all interested

³⁶Mui (n 32) para 97(d).

³⁷Mui (n 32) para 97(e).

³⁸Mui (n 32) para 97(f).

³⁹Constitutional Petition No.s 305 of 2012, 34 of 2013 & 12 of 2014 (Formerly Nairobi Constitutional Petition 43 of 2014) (Consolidated)

⁴⁰(2006) 2 SA 311.

parties to know about the issues likely to affect them and have an adequate say regarding the same. He further noted that what amounts to a reasonable opportunity varies on a case to case basis.

The court in the case of; *Republic v The Attorney General & Another ex parte Hon. Francis Chachu Ganya* uttered important statements regarding access to information. It stated that; “*Participation of the people necessarily requires that the information be availed to the members of the public whenever public policy decisions are intended and the public be afforded a forum in which they can adequately ventilate them.*”⁴¹ Hence, the sharing of information with the public depends on its availability.

The recent court decision in the case of; *David Ndi & Others vs Attorney General & Others*⁴² codified to a great extent the aspect of meaningful public participation when it provided verbatim thus; “*...As we have said above, the principle of public participation is a founding value in our Constitution. Citizens now take a central role in determining the way they want to be governed, and must be involved in legislative and other processes that affect them at all times. In that regard, for meaningful public participation to be realized, citizens must be given information they require to make decisions that affect them.*”

c) Delimiting the Importance of Public Participation and in protection of environmental resources

Without a doubt and from the foregoing it is crystal clear that meaningful public participation is important in protection of environmental resources. Indeed, public participation is an indelible feature in environmental decision-making in many environmental regulatory systems world-wide. Individuals and organizations that are to be affected by development approvals, pollution licences, land use plans and other types of regulatory processes have

⁴¹JR Miscellaneous Application No. 374 of 2012).

⁴² Constitutional and Human Rights Division Petition No. E282 of 2020 (Consolidated With Petition NOs. 397 of 2020, E400 of 2020, E401 of 2020, E402 of 2020, E416 of 2020, E426 of 2020 and 2 of 2021)

increasingly demanded greater consultation, and more transparent and accountable decisions.⁴³

The importance of public participation in environmental decision-making processes cannot be emphasized enough. It is a right which provides for active citizenry in all matters affecting public interest. Firstly, public participation results to better decision making. This is because it ensures that the government agency or public officials are aware of the needs of the people, hence helping them to make decisions that lasts longer and that have more validity.⁴⁴ It helps them understand and identify public interest concerns while formulating environmental policies. Secondly, better decision-making trickles down towards the improvement of the quality of life. Engagement of the people exposes local conditions that might not be widely known.⁴⁵

Buttressing the importance of public participation in environmental matters, *Dr. Kariuki Muigua* argues that citizens know the country's land and natural attributes more intimately than a government ever will. Thus, involving them before making decisions helps in tapping the direct and immediate connection between them and the environment. Citizen's day-to-day observation grants them access to information about environmental conditions that the government could never obtain.⁴⁶

Thirdly, involvement of the people brings in more points of view and consideration of these points leads to the improvement in social conditions, the economy and the environment. Involvement of the public promotes

⁴³Benjamin Richardson and Jona Razzaque, 'Public Participation in Environmental Decision-making' [2006] *Research Gate* 165.

⁴⁴ The Aarhus Convention Newcastle Workshop, 'Public Participation in Local Environmental Decisions' [1999] 11.

⁴⁵Mui Coal Basin Local Community & 15 others v Permanent Secretary of Energy & 17 others [2015] eKLR.

⁴⁶ Kariuki Muigua, *Securing Our Destiny through Effective Management of the Environment* (Glenwood Publishers, 2020) page 78-79

environmental justice and it also helps to integrate ecological and social considerations in governmental decisions.⁴⁷

Fourthly, involving the public at an early stage in the decision-making process, and finding ways for their views to be heard and taken into account, helps build consensus. By being involved in the process, the citizens will understand why a particular decision was made even though they do not agree with it.⁴⁸ Consequently, this leads to less litigation, fewer delays and better implementation of the decisions made.⁴⁹ It addresses the distrust that results from the predominance of experts in environmental decision-making.⁵⁰

Fifthly, public participation helps in assessing the scientific and technical uncertainties occasioned by environmental threats such as climate change, as well as weigh such uncertainties against perceived benefits.⁵¹

Lastly, public participation improves democracy. Engaging citizens before making decisions shows them that they are valued and that their views are important.⁵² It also strengthens public support for and awareness of environmental goals. Additionally, it builds trust and confidence in the authority making the decision.⁵³

Considering the importance of public participation there arises then the question of who should participate in this process. The case of; *Mui Coal Basin Local Community & 15 others v Permanent Secretary of Energy & 17 others* gave a detailed answer to this seminal question. The court notes that,

⁴⁷Benjamin Richardson and Jona Razzaque, 'Public Participation in Environmental Decision-making' [2006] *Research Gate* 166.

⁴⁸ Kariuki Muigua, *Securing Our Destiny through Effective Management of the Environment* (Glenwood Publishers, 2020) page 12

⁴⁹Benjamin Richardson and Jona Razzaque (n 47) page 166.

⁵⁰Stockholm Environment Institute, *Making Space: how Public Participation shapes environmental decision-making* (2019) 2.

⁵¹*Ibid* No.50

⁵²The Aarhus Convention Newcastle Workshop, 'Public Participation in Local Environmental Decisions' [1999] 11.

⁵³ Muigua (n 48).

“public participation does not dictate that everyone must give their views on an issue of environmental governance. To have such a standard would be to give a virtual veto power to each individual in the community to determine community collective affairs...thus, the individuals likely to be directly affected by the activities to be carried out should be afforded a reasonable opportunity to participate and air out their views.”⁵⁴

This position is supported by scholars such as *Driessen and Vermeulen* who noted that the focus of those engaged in public participation should be on complete representation of interests as opposed to full inclusion; where the stakeholders believed to represent the interest of the public are engaged in the process rather than the participation of everybody.⁵⁵

d) Environmental Impact Assessments as a means of ensuring effective management and protection of environmental resources.

Environmental Impact Assessments (EIA) is one of the processes which influence environmental decisions. Section 2 of EMCA defines environmental impact assessment as a systematic examination conducted to determine whether or not a programme, activity or project will have any adverse impacts on the environment.

Despite the importance of EIA in environmental protection they can be a barrier to meaningful public participation. The first barrier that Environmental Impact Assessments (EIA) present is the quality of the information. Having a look at the EIA reports published by the National Environmental Management Authority will tell you that the way in which the reports are presented is wanting. The reports are usually too wordy and this makes it difficult for a lay person to capture the important details. This

⁵⁴Constitutional Petition Nos 305 of 2012, 34 of 2013 & 12 of 2014(Formerly Nairobi Constitutional Petition 43 of 2014) (Consolidated)

⁵⁵Driessen P and Vermeulen W, ‘Network Management in Perspective: Concluding Remarks on Network Management as an Innovative Form of Environmental Management’ [1995] Kluwer Academic Publishers.

goes hand in hand with the method used to relay this information. EIA advertisements for the public are mostly done in daily newspapers.⁵⁶

This action faces the problem of inadequate interpretation of the message as a result of English being used and consequently, important aspects of the message are left out. The problem with newspapers is that not all people get access to them, which only worsens the situation.

The second barrier is the language used. Language plays an important role in ensuring that the target audience absorbs the information being relayed. Truth be told, majority of the people in these communities likely to be affected by the operations are illiterate and if literate, they face difficulties in trying to understand the Queen's Language. Research has shown that English is used in pamphlets, photos and maps used in public participation events. *"Although English is Kenya's national language and the literacy level may be 79%, often the message is lost because of inadequate interpretation. Consequently, there is inadequate explanation of background and technical material that may help the public to contribute effectively in EIA deliberations."*⁵⁷

e) Reducing the Barriers to Public Participation as a means of ensuring effective management and protection of environmental resources

Reducing the barriers to public participation will ultimately result to the enhancement of the same. Firstly, it is important to note that majority of the households in Kenya rely on radio as their source of information. This is due to the fact that they are able to access local stations which relay information in the most effective way. Therefore, harnessing and utilising these stations presents a good way through which the public can be educated about the projects proposed to be carried out.

Secondly, pamphlets and posters as well as EIA study reports should be written in indigenous language in order to help the public digest the

⁵⁶Nick Okello Lindsay Beevers Wim Douven & Jan Leentvaar, 'The doing and undoing of public participation during environmental impact assessments in Kenya' (2009) 27(3) *Impact Assessment and Project Appraisal* 222

⁵⁷Ibid No.56

information as well as contribute effectively in public participation events. Simple examples and illustrations, especially in diagrams should be included as well. Diagrams tend to stick in the mind better than plain text.

Thirdly, holding meetings with the public at their local church or at the local market where they carry out their livelihoods is more convenient than inviting them to a local hotel. This also helps in including other people who had no idea of such a meeting being convened. Understanding the dynamics of the public such as where to get them is vital in enhancing effective public participation.

Fourthly, increased application of interactive mechanisms at the different levels of public participation helps in expanding and equipping them with the relevant information that they can use to make decisions. For example, a visit to a successful development of a related project during scoping can help the affected community understand different aspects and participate in an informed way.

Lastly, although this might be expensive on the side of the proponents, issuing incentives to the public might increase participation. Incentives such as transportation to the venue of the participation especially in areas where the distance between the venue and the residence is far would do. However, caution must be taken so as to avoid diverting the public's attention to irrelevant issues.

3.0 Conclusion

The concept of public participation is an established and justiciable right in Kenya. Indeed, public participation cements a critical and foundational principle of the Constitution namely sovereignty of the people as constituted by Article 1 of the Constitution of Kenya 2010.

Jurisprudence has firmly established that courts will firmly strike down any laws or public acts or projects that do not meet the public participation threshold. Indeed, it is correct to say that our Constitution, in imagining a new beginning for our country in 2010, treats secrecy in matters of public interest as anathema to our democracy.

It is without a doubt then that, matters such protection of environmental resources requires meaningful public participation. In essence, incorporating all the elements of meaningful public participation as stipulated above will enhance public participation in environmental matters. This will in return ensure effective management and protection of environmental resources

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