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Editor's Note

Welcome to Volume 8 issue 3 of the *Journal of Conflict Management and Sustainable Development*.

The Journal offers a platform for scholarly debate on pertinent themes in the fields of Conflict Management and Sustainable Development. Since its launch, the Journal has continued to grow and is now widely regarded as one of the most authoritative publications in the fields of Conflict Management and Sustainable Development.

Sustainable Development has been adopted as the global blueprint for development as envisioned by the United Nations 2030 Agenda for Sustainable Development. In Kenya, it has been embraced by the Constitution as one of the national values and principles of governance. The Journal interrogates the role of Conflict Management in the Sustainable Development agenda.

The Journal is peer reviewed and refereed so as to ensure credibility of information and validity of data.

This volume contains papers covering pertinent themes in Conflict Management and Sustainable Development including: *Strengthening the Environmental Liability Regime in Kenya for Sustainable Development; Electoral Dispute Resolution Mechanisms in Kenya; Achieving Environmental Security in Kenya; Critiquing the place of Environmental Impact Assessment as a tool for Enhancing Environmental Protection in Kenya; Online Dispute Resolution: The Future of E-Commerce in Kenya; Securing the Right to Strike for Workers in Essential Services in Kenya and A Passive Observer or an Active Participant: Role of the Judicial Officer in the Criminal Trial in Kenya*.

I wish to thank our able team of reviewers, editors, contributors and everyone who has made publication of this Journal possible. The Editorial Team welcomes feedback from our readers across the globe to enable us continue improving the Journal.

The Editorial Team also welcomes submission of papers, case reviews, commentaries and book reviews on the themes of Conflict Management and Sustainable Development to be considered for publication in subsequent issues of the Journal. Submissions can be channeled to editor@journalofcmsd.net and copied to admin@kmco.co.ke.

The Journal can be accessed online at https://journalofcmsd.net .

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Editor, Nairobi,
May, 2022.

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election'. He is a former chair of the Law Society of Kenya (LSK), former President of the East African Law Society (EALS) and former Vice President and Financial Secretary of Pan African Lawyers Union (PALU). He has also served as a Commissioner in the Judicial Service Commission (JSC), Commissioner in the Truth Justice and Reconciliation Commission (TJRC) established after the 2007-2008 post-election violence in Kenya, Chair of the Land Acquisition Compensation Tribunal, and member of the National Environmental Tribunal. Formerly, he was also a Council Member of the International Bar Association, and Member of the Board of American Biographical Society, the Council of Legal Education, the Public Law Institute of Kenya, and the Kenya Industrial Property Institute.

Prof. Ojienda, SC has published over 40 articles and 15 books. The books include "Conveyancing: Theory and Practice" published by T.O. Ojienda and A.D.O. Rachier, Faculty of Law Moi University; "Constitution Making and Democracy in Kenya" edited by T.O. Ojienda ISBN: 9966-9611-3-6; "The Dawn of a New Era 2004" edited by Tom Ojienda, ISBN-9811-4-4; "A General Introduction to the New Law of the Sea" Published by T.O. Ojienda and Kindiki Kithure; "The Legal Profession and Constitutional Change in Kenya; Anti-Corruption and Good Governance in East Africa: Laying Foundations for Reform" edited by Tom O. Ojienda and published by Law Africa Publishing (K) Ltd, Co-op Trust Plaza, 1st Floor, ISBN.9966-7121-1-9, 221 pages; "Conveyancing Principles and Practice" by Tom O. Ojienda and published by Law Africa Publishing (K) Ltd, Co-op Trust Plaza, 1st Floor, 521 pages; 'Conveyancing Principles and Practice' by Dr. Tom O. Ojienda and published by Law Africa Publishing (K) Ltd, Co-op Trust Plaza, 1st Floor (Revised edition); "Professional Ethics" by Prof. Tom Ojienda & Katarina Juma published by Law Africa Publishing (K) Ltd, Co-op Trust Plaza, 1st Floor.(Revised Edition) 195 pages; "The Enforcement of Professional Ethics in Kenya" (with Prof. Cox), Amazon Publishers, 2014; "Constitutionalism and Democratic Governance in Africa" (with Prof Mbodenyi), pulp publishers, 2013; "Mastering Legal Research" published by Law Africa, 2013; "Professional Ethics, A Kenyan Perspective" published by Law Africa 2012; "Anti-Corruption and Good Governance in East Africa" published by Law Africa, 2007; and "Conveyancing Theory and Practice" published by Law Africa, 2002.

Prof. Ojienda, SC's published articles include: "Sustainability and The Ivory Trade. Whither the African Elephant?" published in the 2002 issue of the East African Law Review; "Pitfalls in the Fight against Corruption in Kenya: Corruption or Inertia?" in "Anti-Corruption and Good Governance in East Africa: Laying Foundations for Reform" by T. O. Ojienda (eds) pages 95 – 131; "Exploring New Horizons in the Discipline of Advocates, Towards a Review of the Existing Regime of Law" published in "The Advocate; Learning Law by Doing Law: The Theoretical Underpinnings and Practical Implications of Clinical Legal Education in Kenya"; and "An Inventory of Kenya's Compliance with International Rights Obligations: A Case Study of the International Covenant on Civil and Political Rights" the East African Journal of Human Rights and Democracy Vol. 1, Issue No. 1, September 2003 at page 91-104; "Sectoral Legal Aid in Kenya: The Case of the Rift Valley Law Society Juvenile Legal Aid Project", published in various journals including the Advocate, the Lawyer, and the Newcastle Law Bulletin; "Surrogate Motherhood and the Law in Kenya: A Comparative Analysis in a Kenya Perspective"; "Polygamous Marriages and Succession in Kenya: Whither "the other woman?"; "Reflections on the Implementation of Clinical Legal Education in Moi University, Kenya" published in the International Journal of Clinical Education Edition No. 2, June 2002 at page 49-63; "Taking a Bold Step Towards Reform: Justifying Calls for Continuing Legal Education and Professional Indemnity" published in Law society of Kenya Publication (2003); "Terrorism: Justifying Terror in Kenya?" published in The East African Lawyer, Issue No. 5 at pages 18-22; "Land Law and Tenure Reform in Kenya: A Constitutional Framework for Securing Land Rights"; "A Commentary on Understanding the East African Court of Justice" published in the East African Lawyer, Issue No. 6 at pages 52-56; "Where Medicine Meets the Law: The Case of HIV/AIDS Prevention and Control Bill 2003" published in The Advocate at page 36-40; "The Advocates Disciplinary Process-Rethinking the Role of the Law Society" published in The Lawyer, Issue No. 78 at pages 15-16; "Ramifications of a Customs Union for East Africa" published in The East African Lawyer, Issue No. 4 at pages 17-25; "Gender Question: Creating Avenues to Promote Women Rights after the Defeat of the proposed Constitution" published in the Moi University Journal Vol. 1 2006 No.1, pages 82–92; "Of Mare Liberum and the Ever Creeping State Jurisdiction: Taking an Inventory of the Freedom of the Seas" published in the Moi University Journal Vol. 1 2006 No. 1, pages 105 – 131; "Legal and Ethical Issues Surrounding HIV

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Strengthening the Environmental Liability Regime in Kenya for Sustainable Development

By: ***Kariuki Muigua****

Abstract

This paper discusses the concept of environmental liability and offers some recommendations on how the same can be enhanced in the context of the Kenyan environmental liability regime with the aim of achieving the country's goals on sustainable development. The paper argues that there is a need to adopt a more preventive or precautionary approach that is participatory rather than concentrating on a reactive one that seeks restoration of damaged environmental resources.

1. Introduction

This paper critically discusses the environmental liability regime in Kenya and offers some thoughts on how the same can be made more effective as a way of fast tracking the realisation of the sustainable development agenda in the country.

Environmental liability may be defined as an obligation which may result in future payments for the enterprise, due to past events or to compensate a third party harmed by environmental damage by the company. [1] Liabilities incurred can be derived from either legal obligations, such as rehabilitation of land, a fine or compensation as a result of court decision, or from

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[1] Nuta, F. M., & Nuta, A. C., "Environmental Liabilities Accounting: A Review Of Some Standards And Guidelines," *Journal of Public Administration, Finance and Law* 2, no. 2 (2012): 47-51, at p.47.

contractual obligations arising out of company's internal commitment to environmental safeguards.[2]

The Report of the World Commission on Environment and Development, *Our Common Future,* asserted that economic growth always brings risk of environmental damage, as it puts increased pressure on environmental resources.[3] This risk is ever increasing especially in the era of the growing desire by various states especially in the developing world to achieve economic development. The sustainable development agenda has however brought to the fore the need for consideration and incorporation of environmental protection and conservation measures in all development plans. As a result of this, environmental liability stems from the states' desire and responsibility to not only ensure the protection of the right to clean and healthy environment but also the fact that the environment is considered to be the main reservoir for most of the resources necessary for realisation of economic and social rights.[4] Environmental protection is considered to be the existential right of man and is a necessary condition for the survival of mankind.[5]

On a general scale, it is believed that environmental hazards are responsible for an estimated 25% of the total burden of disease worldwide, and nearly 35% in regions such as sub-Saharan Africa.[6] In this regard, it has been argued that addressing the effects of the environment on human health is essential if

[2] Ibid, at p.47.
[3] Report of the World Commission on Environment and Development, *Our Common Future,* op cit., para. 50.
[4] See generally, Muigua, K., *Reconceptualising the Right to Clean and Healthy Environment in Kenya*, Paper Presented at the side event at the 3rd United Nations Environment Assembly held in Nairobi, organized by the UoN School of Law & the Centre International de Droit Comparé de l'Environnement (CIDCE), at the UoN School of Law on Friday 1st December 2017.
[5] Krstinić, D., Bingulac, N., & Dragojlović, J., "Criminal and civil liability for environmental damage." *Economics of Agriculture* 64, no. 3 (2017): 1161-1176, at p. 1162.
[6] Health and Environment Linkages Initiative – HELI, *Health and Environment Linkages Initiative*, available at *http://www.who.int/heli/en/ [*Accessed on 07/05/2022].

we are to achieve the goal of health for all.[7] Human health is believed to be connected to environmental health and that the two are mutually dependent.[8]

According to the World Health Organization (WHO), environmental health is concerned with all the physical, chemical, and biological factors external to a person, and all the related factors impacting behaviours. It encompasses the assessment and control of those environmental factors that can potentially affect health.[9] Health is defined as a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.[10] The WHO has asserted that more than three million children under five die each year from environment-related causes and conditions. This thus, makes the environment one of the most critical contributors to the global toll of more than ten million child deaths annually-as well as a very important factor in the health and well-being of their mothers.[11] The WHO observes that polluted indoor and outdoor air, contaminated water, lack of adequate sanitation, toxic hazards, disease vectors, ultraviolet radiation, and degraded ecosystems are all important environmental risk factors for children, and in most cases for their mothers as well.[12]

Human rights and the environment are said to be inherently interlinked, as the life and the personal integrity of each human being depends on protecting

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[7] Higenbottam, N., 'Nurse's Role as an Environmental Activist,' p.2. Available at *http://www.theluminaryproject.org/downloads/Essay%20Contest%20Higenbottam.pdf* [Accessed on 07/05/2022].

[8] World Health Organization, *Human health under threat from ecosystem degradation*, *9 December 2005,* available at *http://www.who.int/mediacentre/news/releases/2005/pr67/en/* [Accessed on 07/05/2022]. s

[9] World Health Organization, *Environmental Health*, available at *http://www.who.int/topics/environmental_health/en/* [Accessed on 07/05/2022].

[10] World Health Organization, '1948 WHO definition of health,' Constitution of World Health Organization. Available at https://www.who.int/governance/eb/who_constitution_en.pdf

[11] World Health Organization, Children's environmental health: The environment and health for children and their mothers,' available at *http://www.who.int/ceh/publications/factsheets/fs284/en/* [Accessed on 07/05/2022].

[12] Ibid.

the environment as the resource base for all life.[13] A degraded environment leads to a scramble for scarce resources and may culminate in poverty and even conflict.[14]

Despite the progressive Kenyan Constitution making great strides in promoting environmental conservation and protection[15], there is still no evidence of strict environmental culpability in cases of environmental damage, with many of the environmental restoration and protection initiatives being left to the state.[16] Some of the existing tools on environmental liability have been used as a mere formality to satisfy statutory requirements, unless the courts and tribunals intervene.

It is against this background that this paper examines the status of the environmental liability regime in Kenya and makes some recommendations on how enforcement and compliance with environmental standards can be enhanced as a step towards realising sustainable development in the country.

2. Environmental Liability under the International and Regional Environmental Legal Framework

Internationally and regionally, there are a number of instruments that strive to facilitate enforcement and compliance with environmental laws and regulations. Some of these instruments have also made attempts to apportion blame in environmental degradation.

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[13] F.X., Perrez, 'Key questions concerning the human rights and environment debate: An introduction,' in *Human Rights and the Environment: Proceedings of a Geneva Environment Network roundtable,* (United Nations Environment Programme for the Geneva Environment Network, 2004), p.4.

[14] 'Wangari Maathai-an excerpt from the Nobel Peace Prize winner's Acceptance Speech,' *Earth Island Journal*. Available at *http://www.earthisland.org/journal/index.php/eij/Art./wangari_maathai_an_excerpt_from_the_nobel_peace_prize_winners_acceptance_sp/* [Accessed on 07/05/2022].

[15] See Chapter Five of the Constitution, Part 2 (Articles 69-72).

[16] Article 69 of the Constitution of Kenya 2010 outlines the obligations of the State in respect to the environment with individual persons only having a corresponding duty to cooperate with the State. This is based on the presumption that the State will take up its obligations.

Article 2 (1) of the *Vienna Convention*[17] outlines some of the States' general obligations towards the ozone layer. The Parties to the Convention are required to take appropriate measures in accordance with the provisions of the Convention and of those protocols in force to which they are party to protect human health and the environment against adverse effects resulting or likely to result from human activities which modify or are likely to modify the ozone layer. This Convention mainly advocates for preventive and control measures by States implemented through cooperation.

The *1972 Stockholm Declaration of the United Nations Conference on the Human Environment* under Principle 13 deals with the issue of compensation for damage to victims of environmental damage in a manner that: "Member States should adopt national laws relating to liability and compensation to victims of pollution and other environmental damage. Member States should also cooperate without delay and decisively in the adoption of future international regulations relating to liability and compensation, when activities within their legal competence or control cause environmental effects in areas outside their jurisdiction."

The Rio Conference on Environment and Development from 1992 established the basic principles of civil protection of basic ecological values, but also the precautionary principle, all based on the recommendations of the Brundland Commission.[18]

The *Montreal Protocol*,[19] also an international Treaty, aims to regulate the production and use of chemicals that contribute to the depletion of Earth's ozone layer. The Protocol sets limits on the production of

[17] United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331. Kenya is a signatory to the Convention.
[18] Krstinić, D., Bingulac, N., & Dragojlović, J., "Criminal and civil liability for environmental damage," op. cit., at p. 1167.
[19] Montreal Protocol and (London Amendment) on Substances that Deplete the Ozone layer, 1522 UNTS 3; 26 ILM 1550 (1987). Kenya is a signatory to the Protocol.

chlorofluorocarbons (CFCs), halons, and related substances that release chlorine or bromine to the ozone layer of the atmosphere.[20]

Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal[21] affirms that States are responsible for the fulfillment of their international obligations concerning the protection of human health and protection and preservation of the environment, and are liable in accordance with international law.[22] The Convention is also based on the fact that States should take necessary measures to ensure that the management of hazardous wastes and other wastes including their transboundary movement and disposal is consistent with the protection of human health and the environment whatever the place of disposal.

The Convention requires Parties to co-operate with a view to adopting, as soon as practicable, a protocol which sets out appropriate rules and procedures in the field of liability and compensation for damage resulting from the transboundary movement and disposal of hazardous wastes and other wastes.[23]

Also relevant is the *Minamata Convention on Mercury*[24] is a global treaty to protect human health and the environment from the adverse effects of mercury. Major highlights of the Minamata Convention include a ban on new mercury mines, the phase-out of existing ones, the phase out and phase down of mercury use in a number of products and processes, control measures on emissions to air and on releases to land and water, and the regulation of the informal sector of artisanal and small-scale gold mining. The Convention also addresses interim storage of mercury and its disposal once it becomes

[20] Arts. 2A-I.
[21] Basel, 22 March 1989, 1673 UNTS 126; 28 ILM 657 (1989). Kenya is a signatory to the Convention.
[22] Preamble.
[23] Art. 12.
[24] 16 August 2017, No. 54669. Adopted in 2013 in Japan, entered into force in 2017.

waste, sites contaminated by mercury as well as health issues.[25] Kenya signed up on 10 Oct 2013 but is yet to ratify the Convention.[26]

Also notable is the *European Charter on Environment and Health*[27] which provides for both entitlements and responsibilities. Article 2 thereof provides that every individual has a responsibility to contribute to the protection of the environment, in the interests of his or her own health and the health of others.

The International Court of Justice, in the 1997 case concerning the *Gabcíkovo-Nagymaros Project* (Hungary and Slovakia)[28], observed that "the protection of the environment is…a vital part of contemporary human rights doctrine, for it is a *sine qua non* for numerous human rights such as the right to health and the right to life itself. It is scarcely necessary to elaborate on this, as damage to the environment can impair and undermine all the human rights spoken of in the Universal Declaration and other human rights instruments." The Court held that the corpus of international law which relates to the environment now consists of the general obligation of states to ensure that activities within their jurisdiction and control respects the environment of other states or areas beyond national control. The concept of sustainable development is in consonance with the need to reconcile economic development with the protection of the environment. Hence, the terms of agreements to implement must be negotiated by the parties.[29]

3. Environmental Liability under Kenya's Legal Framework: the (In) adequacy

Under the Fourth Schedule to the Constitution, the National and County Governments have shared responsibilities when it comes to environment and

[25] http://www.mercuryconvention.org/Convention/Text [Accessed on 07/05/2022].
[26] https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-17&chapter=27&clang=_en
[27] WHO, *European Charter on Environment and Health*, 1989, European Series No. 35, adopted at the First European Conference on Environment and Health Frankfurt, 7–8 December 1989.
[28] GabCikovo-Nagymaros Project (HungarylSlovakia), Judgment, 1. C. J. Reports 1997, p. 7.
[29] Ibid.

natural resources. The National Government is tasked with protection of the environment and natural resources with a view to establishing a durable and sustainable system of development, including, in particular—fishing, hunting and gathering; protection of animals and wildlife; water protection, securing sufficient residual water, hydraulic engineering and the safety of dams; and energy policy.[30] It is also to come up with health policy; agricultural policy; and the energy policy including electricity and gas reticulation and energy regulation.[31]

On the other hand, the functions and powers of the county are, *inter alia*: agriculture, including—crop and animal husbandry; livestock sale yards; plant and animal disease control; and fisheries.[32] They are also tasked with County health services, including, in particular— county health facilities and pharmacies; ambulance services; promotion of primary health care; licensing and control of undertakings that sell food to the public; and refuse removal, refuse dumps and solid waste disposal.[33] The other function of county governments is control of air pollution, noise pollution, other public nuisances and outdoor advertising.[34] The foregoing functions all contribute in one way or the other to creation of a clean and healthy environment.[35] The two government levels should work together to facilitate a coordinated, multisectoral approach for effectiveness discharge of their environmental responsibilities.

3.1 Environmental Management Tools in Kenya

While some approaches seek to rely on a human rights approach to environmental conservation and protection, it has rightly been argued that there are other regulatory approaches to achieving environmental protection and public health that are not rights-based. These include economic incentives and disincentives, criminal law, and private liability regimes

[30] Fourth Schedule to the Constitution, Part I clause 22.
[31] Clauses 28, 29, 31.
[32] Fourth Schedule to the Constitution, Part II, Clause 1.
[33] Ibid, clause 2.
[34] Ibid, clause 3.
[35] Article 42, Constitution of Kenya 2010 (Government printer, Nairobi, 2010).

which have all formed part of the framework of international and national environmental law and health law.[36]

This section discusses some of these approaches in reference to Kenya's environmental laws. It is however worth pointing out that while most of these tools are provided for and enforced through the *Environmental Management and Coordination Act* (EMCA)[37], there are corresponding provisions and requirements under the variou sectoral laws on water[38], land[39], forests[40],

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[36] Shelton, D., 'Human Rights, Health and Environmental Protection: Linkages in Law and Practice: A Background Paper for the WHO,' p. 3. Available at *http://www.who.int/hhr/information/Human_Rights_Health_and_Environmental_Protection.pdf* [Accessed on 07/05/2022].

[37] *Environmental Management and Coordination Act* (EMCA), Act No. 8 of 1999, Laws of Kenya; See also *Environmental Management and Coordination (Amendment) Act*, 2015).

[38] *Water Act, No. 43 of 2016*, Laws of Kenya:

> Sec. 144. (l) Power to order a person to remedy the contravention of the Act and in particular-
>
> (a) to clean up any pollution or make good any other harm identified to any water resource; or
>
> (b) to remove or destroy any works, plant or machinery employed for the purposes of the contravention.
>
> (2) Power to recover the expenses incurred in remedying the contravention through an application to the Tribunal.
>
> Sec. 146. Power to institute and maintain criminal proceedings in any court against any person accused of an offence under this Act or under any Regulations or Regulations made under this Act.

[39] Land Act, No. 6 of 2012, Laws of Kenya:

> **11. Conservation of ecologically sensitive public land.**
>
> **12. Allocation of public land.**
>
> **148. Compensation in respect of public right of way.**

[40] Forests Management and Conservation Act, No. 34 of 2016, Laws of Kenya:

> 44. Compulsory restoration and re-vegetation where forests are depleted.
>
> 46. Requirements for a strategic environmental, cultural, economic and social impact assessment licence.

mining[41], public health[42], agricultural production[43] and energy[44] sectors, among others. Their wordings may be different but they are mainly

[41] Mining Act, No. 12 of 2016, Laws of Kenya:

> 101. (2) Environmental and social impact assessment report and environmental management plan for the term of the mining licence to the National Environment Management Authority;
>
> 181. (1) Environmental protection bond sufficient to cover the costs associated with the implementation of the environmental and rehabilitation obligations of the licence holder.

[42] Public Health Act, Cap 242, Laws of Kenya:

An Act of Parliament to make provision for securing and maintaining health

Health Act, No. 21 of 2017, Laws of Kenya:

> 15. (1) The national government ministry responsible for health shall- (v) provide policy guidelines and regulations for hospital waste management and conduct of environmental health impact assessment;

[43] Agriculture, Fisheries and Food Authority Act, No. 13 of 2013, Laws of Kenya:

An Act of Parliament to provide for the consolidation of the laws on the regulation and promotion of agriculture generally, to provide for the establishment of the Agriculture, Fisheries and Food Authority, to make provision for the respective roles of the national and county governments in agriculture excluding livestock and related matters in furtherance of the relevant provisions of the Fourth Schedule to the Constitution and for connected purposes.

Fisheries Management and Development Act, No. 35 of 2016, Laws of Kenya:

> 49. (1) prohibition of introduction into the Kenya fishery waters any toxic, hazardous or other harmful substances.

Crops Act, No. 16 of 2013, Laws of Kenya:

4. (b) land owners and lessees of agricultural land, being stewards, have the obligation to cultivate the lands they own or lease and make the land economically productive on a sustainable and environmentally friendly manner;

concerned with health and environmental protection while carrying out various activities or laying out relevant infrastructure. They also define penalties and other remedies in case of violation of set rules and regulations.

a. Civil Liability Against State and Private persons

Civil law protection of the environment is not regulated directly by specific regulations, but it is foreseen by legislative instruments in the area of compensation of damages.[45] Civil law protection is enforced through sanctions as a mechanism of coercion against a person or entity that causes damage, with the aim of achieving and bringing the property or other personal non-material goods to the state in which they were before threat or disturbance.[46] Notably, civil law sanctions relating to protection of the environment are grouped on the basis of their function: *preventive sanctions, natural restitution and compensatory and reparatory sanctions* (emphasis added).[47] The objective of preventive sanctions, which can be assumed, is to eliminate potential hazards, i.e. to prevent activities that are causing harassment or the danger or harm that might occur.[48]

The *Draft Principles on Human Rights and the Environment of 1994*,[49] declare that all persons have the right to freedom from pollution, environmental degradation and activities that adversely affect the

[44] Energy Act, No. 1 of 2019, Laws of Kenya:

> 100. (2) All licences or permits issued by the Authority shall include-
> (a) a requirement that the licensee shall comply with all applicable environmental, health and safety laws;
> (b) a stipulation that the licensee is subject to liability under tort and the contract laws;

[45] Krstinić, D., Bingulac, N., & Dragojlović, J., "Criminal and civil liability for environmental damage," *Economics of Agriculture* 64, no. 3 (2017): 1161-1176.
[46] Krstinić, D., Bingulac, N., & Dragojlović, J., "Criminal and civil liability for environmental damage," op cit., 1163.
[47] Ibid., at p. 1163.
[48] Ibid., at p. 1163.
[49] Draft Principles On Human Rights And The Environment, E/CN.4/Sub.2/1994/9, Annex I (1994).

environment, threaten life, health, livelihood, well-being or sustainable development within, across or outside national boundaries.[50]

Enforcing environmental standards and regulations is one of the surest ways governments can use to checkmate the negative impacts of corporation's activities (and even individuals) on the environment and on the lives of inhabitants of host communities.[51]

The current Constitution of Kenya has some express provisions that seek to apportion environmental liability as far as realisation of the right to clean and healthy environment is concerned. For instance, Article 42 of the Constitution of Kenya provides that every person has the right to a clean and healthy environment, which includes the right—to have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 69; and to have obligations relating to the environment fulfilled under Article 70.

Article 69 outlines the State and individual obligations in respect of the environment. Clause (1) provides that the State shall—ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits; work to achieve and maintain a tree cover of at least ten per cent of the land area of Kenya; protect and enhance intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities; encourage public participation in the management, protection and conservation of the environment; protect genetic resources and biological diversity; establish systems of environmental impact assessment, environmental audit and monitoring of the environment; eliminate processes and activities that are likely to endanger the environment; and utilise the environment and natural resources for the benefit of the people of Kenya.

[50] Ibid, Principle 5.

[51] Edo, Z.O., 'The Challenges of Effective Environmental Enforcement and Compliance in the Niger Delta Region of Nigeria,' *Journal of Sustainable Development in Africa*, Vol. 14, No.6, 2012, p. 262.

Article 70(1) provides that if a person alleges that a right to a clean and healthy environment recognised and protected under Art. 42 has been, is being or is likely to be, denied, violated, infringed or threatened, the person may apply to a court for redress in addition to any other legal remedies that are available in respect to the same matter.

To facilitate the implementation of the foregoing provisions, the Constitution gives courts the power to make any order, or give any directions, it considers appropriate – to prevent, stop or discontinue any act on omission that is harmful to the environment, or to any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment, or to provide compensation for any victim of a violation of the right to a clean and healthy environment.[52] An applicant seeking such orders from courts does not have to demonstrate that any person has incurred loss or suffered injury. The Constitution provides that an applicant does not have to demonstrate that any person has incurred loss or suffered injury.[53] However, to succeed in their plea one must demonstrate that their Right under Article 42 has been or is likely to be denied, violated, infringed or threatened.[54]

The *Environment and Land Court Act* 2011[55] establishes the Environment and Land Court[56] and grants it original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.[57] In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court has power to hear and determine disputes— relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents,

[52] Art. 70(2).
[53] Art. 70(3); See also s. 3(1) of *Environment (Management and Conservation) Act*, 1999 (EMCA)
[54] *Joseph Owino Muchesia & another v Joseph Owino Muchesia & another* [2014] eKLR, para. 34.
[55] *Environment and Land Court Act*, No. 19 of 2011, Laws of Kenya.
[56] Ibid, sec. 4.
[57] Ibid, sec. 13(1).

valuations, mining, minerals and other natural resources.[58] Notably, nothing in the Act precludes the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution.[59] In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including— interim or permanent preservation orders including injunctions; prerogative orders; award of damages; compensation; specific performance; restitution; declaration; or costs.[60] Also notable is section 18 thereof which provides that in exercise of its jurisdiction under this Act, the Court shall be guided by the following principles—the principles of sustainable development, including— the principle of public participation in the development of policies, plans and processes for the management of the environment and land; the cultural and social principles traditionally applied by any community in Kenya for the management of the environment or natural resources in so far as the same are relevant and not inconsistent with any written law; the principle of international co-operation in the management of environmental resources shared by two or more states; the principles of intergenerational and intragenerational equity; the polluter-pays principle; and the pre-cautionary principle.

The implication of the foregoing is that even where a party is unable to prove the denial, violation, infringement or threat to environmental rights for one reason or the other, then the court should step in and use their *suo motu* powers in respect of environmental protection and conservation to safeguard the right to clean and healthy environment of all and promote the sustainable development agenda. The set out remedies can go a long way in strengthening the environmental liability regime in Kenya. This is in line with the national values and principles of governance that requires or persons and state organs to promote sustainable development.

[58] Ibid, sec. 13(2) (a).
[59] Ibid, sec. 13(3).
[60] Ibid, sec. 13(7).

These provisions were invoked in the case of *Joseph Leboo & 2 others v Director Kenya Forest Services & another*[61] where the Learned Judge observed that "…in my view, any person is free to raise an issue that touches on the conservation and management of the environment, and it is not necessary for such person to demonstrate, that the issues being raised, concern him personally, or indeed, demonstrate that he stands to suffer individually. Any interference with the environment affects every person in his individual capacity, but even if there cannot be demonstration of personal injury, such person is not precluded from raising a matter touching on the management and conservation of the environment…Any person, without the need of demonstrating personal injury, has the freedom and capacity to institute an action aimed at protecting the environment. The plaintiffs have filed this suit as representatives of the local community and also in their own capacity. The community, of course, has an interest in the preservation and sustainable use of forests. Their very livelihoods depend on the proper management of the forests. Even if they had not demonstrated such interest that would not have been important, as any person *who alleges a violation of any law touching on the environment is free to commence litigation to ensure the protection of such environment*…."[62] (emphasis added)

In addition to the foregoing post constitutional provisions and practice, courts in Kenya have been making positive strides for longer as far as environmental liability is concerned. In the case of *Peter K. Waweru v Republic*, the Court observed that "…environmental crimes under the Water Act, Public Health Act and EMCA cover the entire range of liability including strict liability and absolute liability and ought to be severely punished because the challenge of the restoration of the environment has to be tackled from all sides and by every man and woman…." It went further to state, "…In the name of environmental justice water was given to us by the Creator and in whatever form it should never ever be the privilege of a few – the same applies to the right to a clean environment."[63]

[61] [2013] eKLR, Environment and Land No. 273 of 2013.
[62] Paras 25 & 28.
[63] [2006] eKLR, Misc. Civ. Applic. No. 118 of 2004, p.14.

Courts in most Common Law jurisdictions including Kenya rely on common law principles as in the case of *Rylands vs Fletcher* when determining the issue of strict liability in environmental matters.[64] The English Case of *Rylands vs Fletcher*[65] resulted in what is commonly referred to as the rule in

[64] See also *Donoghue v Stevenson* [1932] UKHL 100, SC (HL) 31, AC 562, All ER Rep 1. It laid the foundation of the modern law of negligence, establishing general principles of the duty of care.

[65] *Rylands vs Fletcher* [1861-73] ALL ER REP 1. In that case, the Defendant had employed contractors to build a reservoir on his land. While building it, the contractors discovered a series of old coal shafts and passages under the land filled loosely with soil and debris, which joined up with Plaintiff's adjoining mine. Rather than blocking these shafts, the contractors left them and as a result the Defendant's reservoir burst and flooded the Plaintiff's mine causing damage. The Court stated as follows:

> *"We think that the true rule of law is that the person who, for his own purposes, brings on his land, and collects and keeps there anything likely to do mischief if it escapes, must keep it at his own peril, and, if he does not do so, he is prima facie answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the Plaintiff's own default, or, perhaps that the escape was a consequence of vis major, or the act of God; but as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient. The general rule, as above stated, seems on principle just. The person whose grass or corn is eaten down by the escaped cattle of his neighbour, or whose mine is flooded by the water from his*
> *neighbour's reservoir, or whose cellar is invaded by the filth of his neighbour's privy, or whose habitation is made unhealthy by the fumes and noisome vapours of his neighbour's alkali works, is damnified without any fault of his own, and it seems but reasonable and just that the neighbour who has brought something on his own property which was not naturally there, harmless to others as long as it is confined to his property, but which he knows will be mischievous if it gets on his neighbour's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. But for his act in bringing it there no mischief would have accrued, and it seems just that he should at his peril keep it there, so that no mischief may accrue, or answer for the natural and anticipated consequences." "If it does escape and cause damage, he is responsible, however careful he may have taken to prevent the damage. In considering whether a defendant is liable to a Plaintiff for the damage which the plaintiff may have sustained, the question in general is not whether the defendant has acted with due care and caution, but whether his acts have occasioned the damage."*

Rylands vs Fletcher which imposes strict liability on the owner of land for damage caused by the escape of substances to his or her neighbour's land. From this case the prerequisites of a strict liability claim are that the defendant made a *"non-natural"*[66] or *"special"* use of his land; that the defendant brought onto his land something that was likely to do mischief if it escaped; the substance in question escaped; and the Plaintiff's property was damaged because of the escape.[67]

The Supreme Court of India has in addition introduced the concept of absolute liability in addition to strict liability where the defendant is engaged in industrial activities resulting in pollution. In the case of *M C Mehta vs Union Of India* [1987] 1 SCC 395, cited with approval in *Indian Council For Enviro-Legal Action & Others vs Union of India & Others* [1996] 2 LRC, the court stated that the test upon which such liability is to be imposed is based on the nature of the activity.[68] Consequently, where an activity is

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[66] The Supreme Court of Colombia in the case of *John Campbell Law Incorporation Vs Owners Strata Plan, 1350 [2001]BSCS 1342,* the principle of non-natural use of land under *Rylands Vs Fletcher* is not a fixed concept but rather an evolving rule which reflects the constant changes that occur in modern life. This approach has also been adopted by different courts in various jurisdictions, including the English courts.

[67] David M. Ndetei v Orbit Chemical Industries Limited [2014] eKLR, para. 23.

[68] It stated-

> *The enterprise must be held to be under an obligation to provide that the hazardous or inherently dangerous activity in which it is engaged must be conducted with the highest standards of safety and if any harm results on account of such activity, the enterprise must be absolutely liable to compensate for such harm and it should be no answer to the enterprise to say that it had taken all reasonable care and that the harm occurred without any negligence on its part. Since the persons harmed on account of the hazardous or inherently dangerous activity carried on by the enterprise would not be in a position to isolate the process of operation from the hazardous preparation of the substance of any other related element that caused the harm, the enterprise must be held strictly liable for causing such harm as part of the social cost of carrying on the hazardous or inherently dangerous activity. If the enterprise is permitted to carry on a hazardous or inherently dangerous activity for its profit, the law must presume that such permission is conditional on the enterprise absorbing the cost of any*

inherently dangerous or hazardous, then absolute liability for the resulting damage attaches on the person engaged in the activity.[69]

As part of civil liability, EMCA also provides for environmental restoration orders, conservation orders, and easements.[70]

b. Criminal Liability in Environmental Matters

Criminal law enforces the protection of society from crime, so that the most favorable protection of the environment is achieved in this way.[71] The *Environmental Management and Coordination Act (EMCA), 1999*, provides for criminal liability in environmental matters under various sections. The Act provides that 'subject to the Constitution and the directions and control of the Attorney-General, an environmental inspector may, in any case in which he considers it desirable so to do:- institute and undertake criminal proceedings against any person before a court of competent jurisdiction (other than a court-martial) in respect of any offence alleged to have been committed by that person under EMCA; and discontinue at any stage with the approval of the Attorney-General, before judgement is delivered any such proceedings instituted or undertaken by himself.[72]

> *accident arising on account of such hazardous or inherently dangerous activity as an appropriate item for its overheads. Such hazardous or inherently dangerous activity for private profit can be tolerated on condition that the enterprise engaged in such hazardous or inherently dangerous activity indemnifies all those who suffer on account of carrying on of such hazardous or inherently dangerous activity regardless of whether it is carried out carefully or not.....We would therefore hold that where an enterprise is engaged in a hazardous or inherently dangerous activity, resulting for example in escape of toxic gas, the enterprise is strictly and absolutely liable to compensate all those who are affected by the accident and such liability is not subject to any of the exceptions which operate vis-a-vis the tortious principle of strict liability under the rule in Rylands Vs. Fletcher [1868] LR 3 HL 330, [1861-73]."*

[69] David M. Ndetei v Orbit Chemical Industries Limited [2014] eKLR, para. 29.
[70] EMCA, Part IX (Sec. 108-116).
[71] Krstinić, D., Bingulac, N., & Dragojlović, J., "Criminal and civil liability for environmental damage," *Economics of Agriculture* 64, no. 3 (2017): 1161-1176.
[72] S. 118, EMCA.

Part XIII of EMCA on environmental offences carries more elaborate provisions on criminal liability in environmental matters. The offences range from failure to maintain proper records as required under EMCA, to violation of environmental standards under the Act and for each there are prescribed penalties.[73]

c. Environmental Impact Assessment

Environmental Impact Assessment means a systematic examination conducted to determine whether or not a programme, activity or project will have any adverse impacts on the environment.[74]

Effective Environmental Impact Assessment (EIA) has been described as 'a process for identifying and considering the impacts of an action'. It is 'not about rejecting development; rather it is about making sure that development proceeds with full knowledge of the environmental consequences'.[75] EIA may provide an opportunity for public scrutiny and participation in decision-making; introduce elements of independence and impartiality; and facilitate better informed judgments when balancing environmental and developmental needs.[76] The Environment (Management and Conservation) Act (EMCA) 1999 [77] provides for the use of Environmental Impact Assessment (EIA) in environmental management and conservation efforts. EIA is defined as an environmental management tool aiming at identifying environmental problems and providing solutions to prevent or mitigate these

[73] Environmental Management and Co-ordination Act, Act. No. 8 of 1999, Part XIII Ss. 137-146.

[74] *Environmental Management and Co-Ordination Act*, No 8 of 1999 (Government Printer, Nairobi, 1999), s.2.

[75] Ingelson, A., et al, 'Philippine Environmental Impact Assessment, Mining and Genuine Development,' *Law, Environment and Development Journal*, Vol. 5, No. 1, 2009, p. 7.

[76] Birnie, P. & Boyle, A., "*International Law and the Environment*", (2nd ed. Oxford University Press, 2002), p.131-132; See also Muigua, K., 'Environmental Impact Assessment (EIA) in Kenya,' available at *http://www.kmco.co.ke/attachments/Art./109/A%20Paper%20on%20Environmental%20impact%20assessment.pdf*

[77] Act No. 8 of 1999, Laws of Kenya.

problems to the acceptable levels and contribute to achieving sustainable development.[78]

In Kenya, an environmental impact assessment study preparation is generally required to take into account environmental, social, cultural, economic, and legal considerations, and should—identify the anticipated environmental impacts of the project and the scale of the impacts; identify and analyze alternatives to the proposed project; propose mitigation measures to be taken during and after the implementation of the project; and develop an environmental management plan with mechanisms for monitoring and evaluating the compliance and environmental performance which should include the cost of mitigation measures and the time frame of implementing the measures.[79]

Principle 17 of the *Rio Declaration on Environment and Development*, states that environmental impact assessment, as a national instrument, should be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority.

EIA can be a powerful tool for keeping the corporates including Multinational Corporations (MNCs) operating in the country in check. However, the general public should be empowered through more meaningful participation in the same to ensure that the EIAs achieve their objectives. This is the only way that the affected sections of population appreciate the use of EIAs and also ensure that such exercises are not mere formalities on paper but are utilised fully for the protection of the right to clean and healthy environment. This is especially for projects taking place within the community dwellings, with potentially great effects on the people's lives

[78] Al Ouran, N.M., 'Analysis of Environmental Health linkages in the EIA process in Jordan,' *International Journal of Current Microbiology and Applied Sciences*, Vol. 4, No. 7, 2015, pp. 862-871, p. 862.
[79] Regulation 16, *Environmental (Impact Assessment and Audit) Regulations, 2003*, Legal Notice 101 of 2003.

such as unregulated mining activities.[80] A good example is the alleged lead poisoning in Owino Uhuru, a slum area in Mombasa city adjacent to a lead battery recycling factory, which has led to protracted court battles.[81] These are some of the incidences that can be avoided through effective enforcement of the environmental laws at the early stages of setting up such factories.

d. Strategic Environmental and Social Assessment (SESA) and Strategic Environmental Assessment (SEA)

Strategic Environmental and Social Assessment (SESA) is an effective environmental management tool since it integrates the social issues that are likely to emerge and not just the environmental considerations.[82]

Strategic Environmental Assessment (SEA) is defined as the process by which environmental considerations are required to be fully integrated into the preparation of *policies, plans and programmes* and prior to their final

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[80] Jenje, B., 'MP to compensate families injured by lead poison 'if guilty',' *Daily Nation,* Wednesday, April 29, 2015, available at *http://www.nation.co.ke/news/politics/MP-to-compensate-families-injured-by-lead-poison-if-guilty/-/1064/2701594/-/15u9ivl/-/index.html* [Accessed on 05/09/2015]; See also Chege, M. W., *et al,* 'Lead contamination of traditional hand-dug wells in parts of Kwale County, Kenya,' *International Journal of Physical Sciences,* Vol. 8, No.17, 9 May, 2013, pp. 835-839.

[81] Okeyo B. & Wangila A., "Lead Poisoning in Owino Uhuru Slums in Mombasa-Kenya," (Eco-Ethics International –Kenya Chapter, 2012). Available at https://www.cofek.co.ke/Lead%20Poisoning%20in%20Owino%20Uhuru%20Slums%20Mombasa.pdf [Accessed on 07/05/2022]; Zoë Schlanger, "A Kenyan mother, two disappearing Indian businessmen, and the battery factory that poisoned a village," Quartz Africa, March 18, 2018. Available at *https://qz.com/africa/1231792/a-battery-recycling-plant-owned-by-indian-businessmen-caused-a-lead-poisoning-crisis-in-kenya/* [Accessed on 24/4/2019].

[82] Notably, the *Energy Act, No. 1 of 2019*, Laws of Kenya, requires under sections 107 (1) and (2)(d) that a person who intends to construct a facility that produces energy using coal shall, before commencing such construction, apply in writing to the Authority for a permit to do so. Such an application must be accompanied by, inter alia, a Strategic Environment Assessment and Social Impact Assessment licenses. Also notable are the provisions of s. 57A(1) of the *Environmental Management Co-ordination (Amendment) Act 2015* which are to the effect that all policies, plans and programmes for implementation shall be subject to Strategic Environmental Assessment.

adoption (emphasis added).[83] The objectives of the SEA process are to provide for a high level of protection of the environment and to promote sustainable development by contributing to the integration of environmental considerations into the preparation and adoption of specified policies, plans and programmes.[84]

e. Environmental Audits and Monitoring

The Constitution of Kenya requires the State to establish systems of environmental impact assessment, environmental audit and monitoring of the environment.[85]

EMCA defines "environmental audit" to mean the systematic, documented, periodic and objective evaluation of how well environmental organisation, management and equipment are performing in conserving or preserving the environment.[86] An initial environmental audit and a control audit are conducted by a qualified and authorized environmental auditor or environmental inspector who is an expert or a firm of experts registered by NEMA. In the case of an ongoing project NEMA requires the proponent to undertake an initial environmental audit study to provide baseline information upon which subsequent environmental audits shall be based. The proponent shall be issued with an acknowledgement letter and an improvement order where necessary.[87]

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[83] Environmental protection Agency, 'Strategic Environmental Assessment,' Available at *http://www.epa.ie/monitoringassessment/assessment/sea/#.Vi5tmGuJ2CA; S. 57(2),* EMCA, provides that for the avoidance of doubt, the plans, programmes and policies (referred to in the Act)are those that are- (a) subject to preparation or adoption by an authority at regional, national, county or local level, or which are prepared by an authority for adoption through a legislative procedure by Parliament, Government or if regional, by agreements between the governments or regional authorities, as the case may be; (b) determined by the Authority as likely to have significant effects on the environment.

[84] Ibid; See also the *Environmental (Impact Assessment and Audit) Regulations, 2003*, Legal Notice 101 of 2003, Regulations 42 & 43.

[85] Constitution of Kenya, 2010, Art. 69(1) (f).

[86] S. 2, EMCA.

[87] The Environmental (Impact Assessment and Audit) Regulations, 2003. Available at

One of the functions of the National Environment Management Authority (NEMA) under EMCA is to identify projects and programmes or types of projects and programme, plans and policies for which environmental audit or environmental monitoring must be conducted under this Act.[88]

NEMA or its designated agents is responsible for carrying out environmental audit of all activities that are likely to have significant effect on the environment. An environmental inspector appointed under the Act may enter any land or premises for the purposes of determining how far the activities carried out on that land or premises conform with the statements made in the environmental impact assessment study report issued in respect of that land or those premises under section 58(2).[89]

The owner of the premises or the operator of a project for which an environmental impact assessment study report has been made should keep accurate records and make annual reports to the Authority describing how far the project conforms in operation with the statements made in the environmental impact assessment study report submitted under section 58(2).[90]

The owner of premises or the operator of a project should take all reasonable measures to mitigate any undesirable effects not contemplated in the environmental impact assessment study report submitted under section 58(2) and should prepare and submit an environmental audit report on those measures to the Authority annually or as the Authority may, in writing, require.[91]

The Authority is empowered to, in consultation with the relevant lead agencies, monitor:- all environmental phenomena with a view to making an assessment of any possible changes in the environment and their possible

https://www.nema.go.ke/index.php?option=com_content&view=article&id=27&Itemid=167 [Accessed on 07/05/2022].

[88] S. 9(2) (j), EMCA.

[89] S. 68(1), EMCA.

[90] S. 68(2), EMCA.

[91] S. 68(3), EMCA.

impacts; or the operation of any industry, project or activity with a view of determining its immediate and long-term effects on the environment.[92]

In addition, an environmental inspector appointed under this Act may enter upon any land or premises for the purposes of monitoring the effects upon the environment of any activities carried on that land or premises.[93]
The *Environment (Assessment and Audit) Regulations, 2003*[94] provide the necessary guidelines on the procedure.

Arguably, NEMA is still facing challenges in discharging its mandate as it is currently and there is a need to work closely with the county governments in order to be in touch with what is happening across the country. These challenges were brought to the public limelight on 10th May, 2018, when Kenyans woke up to the shocking news of the collapse of Milmet Dam – also known as Solai Dam – in Nakuru County. Farms and villages had been washed away in the on-rush of the water's break. Hundreds of people were caught up in the consequent muddy sludge, claiming 47 lives in the downstream flood chaos. The subsequent cases brought against NEMA officials by the Director of Public Prosecutions to hold them liable for the disaster highlighted the challenges that NEMA is facing in discharging its mandate across the country.[95] This therefore calls for concerted efforts from all lead agencies under the direction of NEMA to ensure that environmental standards are upheld and enforced across the various sectors.

f. Implementation Principles of Sustainable Development

One of the national values and principles of governance as provided under Art. 10 of the Constitution is sustainable development. The principles of sustainable development as also captured in EMCA[96] include: the principle of public participation in the development of policies, plans and processes

[92] S. 69(1), EMCA.
[93] S. 69(2), EMCA.
[94] Environmental (Impact Assessment and Audit) Regulations, 2003, Legal Notice 101 of 2003, Laws of Kenya (Government Printer, Nairobi, 2003).
[95] See *Johnson Kamau Njuguna & another v Director of Public Prosecutions* [2018] eKLR, Judicial Review No 9 of 2018.
[96] EMCA, S. 3(5).

for the management of the environment; the principle of international co-operation in the management of environmental resources shared by two or more states; the polluter-pays principle; and the pre-cautionary principle.
Principle 16 of the *Rio Declaration on Environment and Development* states that national authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment.

The "*Polluter Pays Principle*", essentially believed to be a principle of economic policy rather than a legal principle, states that the polluter should bear the expenses of carrying out pollution prevention measures or paying for damage caused by pollution.[97] This was also captured in the *1972 OECD Guiding Principles on the International Economic Aspects of Environmental Policies*, which stated: "The principle to be used for allocating costs of pollution prevention and control measures to encourage rational use of scarce environmental resources and to avoid distortions in international trade and investment is the so-called 'Polluter Pays Principle.' This principle means that the polluter should bear the expenses of carrying out the above mentioned measures decided by public authorities to ensure that the environment is in an acceptable state. In other words, the costs of these measures should be reflected in the cost of goods and services which cause pollution in production and/or consumption. Such measures should not be accompanied by subsidies that would create significant distortions in international trade and investment."[98]

[97] OECD, *Environmental Principles and Concepts*, (Organisation For Economic Co-Operation And Development, Paris, 1995), op cit., Para. 37.
[98] 1972 OECD Guiding Principles on the International Economic Aspects of Environmental Policies, OECD, C (72)128 (As quoted in OECD, *Environmental Principles and Concepts*, (Organisation For Economic Co-Operation And Development, Paris, 1995), op cit., Para. 33).

In the *Trail Smelter Arbitration (United States v. Canada),*[99] the Tribunal held that it is the responsibility of the State to protect other states against harmful acts by individuals from within its jurisdiction at all times. No state has the right to use or permit the use of the territory in a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein as stipulated under the United States (Plaintiff) laws and the principles of international law.

These principles were also the subject of Case concerning *the Gabcíkovo-Nagymaros Project (Hungary/Slovakia), Judgment of 25 September 1997*[100] where the International Court of Justice concluded that both Parties committed internationally wrongful acts, and that those acts gave rise to the damage sustained by the Parties; consequently, Hungary and Slovakia were both under an obligation to pay compensation and were both entitled to obtain compensation.

The OECD Council's *Recommendation on Guiding Principles Concerning International Economic Aspects of Environmental Policies* is believed to have been the first formulation of the Polluter-Pays Principle at the international level, and it sought to encourage sound environmental

[99] Arbitral Trib., 3 U.N. Rep. Int'l Arb. Awards 1905 (1941). The Trail Smelter located in British Columbia since 1906, was owned and operated by a Canadian corporation. The resultant effect of air pollution from the sulfur dioxide from Trail Smelter resulted in the damage of the state of Washington between 1925 and 1937. This led to the United States (P) suit against the Canada (D) with an injunction against further air pollution by Trail Smelter. The decision made by the Tribunal established the concept of Trans Boundary Harm and the principle of the "polluter pays" to ensure sovereignty. (Prunella, C., 'An International Environmental Law case study: The Trail Smelter Arbitration,' December, 2014. Available at *http://intlpollution.commons.gc.cuny.edu/an-international-environmental-law-case-study-the-trail-smelter-arbitration/*[Accessed on 07/05/2022].

[100] International Court of Justice, Communiqué (unofficial) No. 97/10 bis of 25 September 1997 and Judgement. Both available from the ICJ Internet Home Page *(http://www.icj-cij.org/docket/files/92/7375.pdf* [Accessed on 07/05/2022].

management and to harmonise methods for allocating the cost of pollution to avoid distortions in prices for products entering international trade.[101]

While the Polluter-Pays Principle was adopted by the OECD Council in 1972 as an economic principle for allocating the costs of pollution control, it has been observed that it may already have developed into a legal principle, also although not yet been codified because its contents have been changing and continue to change.[102] The Polluter-Pays Principle is also seen not as a principle of equity; rather than to punish polluters, it is designed to introduce appropriate signals in the economic system so as to incorporate environmental costs in the decision-making process and, consequently, to arrive at sustainable, environment-friendly development.[103] The aim is to avoid wasting natural resources and to put an end to the cost-free use of the environment as a receptacle for pollution.[104]

The constitutional provision on the enforcement of the right to clean and healthy environment in Kenya is largely based on the principle of the polluter pays principle[105], where the provisions give extensive powers to the court to compel the government or any public agency to take restorative measures and to provide compensation for any victim of pollution and to compensate the cost borne by victims for the lost use of natural resources as a result of

[101] Vícha, O, The Polluter-Pays Principle In OECD Recommendations And Its Application In International And EC/EU Law, *Czech Yearbook of Public & Private International Law*, Vol. 2, 2011, pp. 57-67.
Available at *files.cyil.eu/200000043-87d4c88ce6/%C4%8CSMP_2011_05_vicha.pdf* Accessed on 07/05/2022].
[102] Ibid, p. 67; See also OECD, *Recommendation of the Council concerning the Application of the Polluter-Pays Principle to Accidental Pollution*, 7 July 1989 - C(89)88/FINAL.
[103] Ibid, p. 67; See also Nicoleta, D.D., 'The Polluter-Pays Principle- -Expression Of Tort Liability For Environmental Protection,' Analele Universităţii din Oradea, Fascicula Protecţia Mediului Vol. XVIII, 2012, pp. 295-302 at p. 301. Available at *http://protmed.uoradea.ro/facultate/anale/protectia_mediului/2012A/im/11.%20Dascalu%20Diana.pdf*
[Accessed on 07/05/2022].
[104] Ibid, p. 67.
[105] Articles 42; 70, Constitution of Kenya 2010.

an act of pollution.[106] EMCA however provides that 'no civil or criminal liability in respect of a project or consequences resulting from a project shall be incurred by the Government, the Authority or any public officer by reason of the approval of an environmental impact assessment study, evaluation or review report or grant of an environmental impact assessment licence or by reason of any condition attached to such licence.'[107] The same defence is however not available to the licensee as the Act provides that 'the issuance of an environmental impact assessment licence in respect of a project shall afford no defence to any civil action or to a prosecution that may be brought or preferred against a proponent in respect of the manner in which the project is executed, managed or operated.'[108]

In addition to the polluter-pays principle, there is also the precautionary principle which also directly impacts on environmental liability.

Principle 15 of the *Rio Declaration on Environment and Development*[109] states that in order to protect the environment, the precautionary approach should be widely applied by States according to their capabilities. Further, it states that where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

The precautionary principle is believed to provide guidance for governance and management in responding to uncertainty.[110] It also provides for action

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[106] Luppi, B., Parisi, F., & Rajagopalan, S., "The rise and fall of the polluter-pays principle in developing countries," *International Review of Law and Economics* 32 (2012): 135-144, at p.138.
[107] EMCA, s. 66(1).
[108] EMCA, s. 66(2).
[109] Principle 15, *1992 Rio Declaration on Environment and Development*, UN Doc. A/CONF.151/26 (vol. I) / 31 ILM 874 (1992). Adopted at the United Nations Conference on Environment and Development in Rio de Janeiro, Brazil from 3-14 June1992.
[110] Cooney, R., *The Precautionary Principle in Biodiversity Conservation and Natural Resource Management: An issues paper for policy-makers, researchers and practitioners*, (IUCN, Gland, Switzerland and Cambridge, 2004), UK. xi + 51pp at p. 1. Available at

to avert risks of serious or irreversible harm to the environment or human health in the absence of scientific certainty about that harm and it is now widely and increasingly accepted in sustainable development and environmental policy at multilateral and national levels.[111]

The emergence of the precautionary principle marked a shift from post-damage control (civil liability as a curative tool) to the level of a pre-damage control (anticipatory measures) of risks.[112] It originated in environmental risk management to provide regulatory authority to stop specific environmental contaminations without waiting for conclusive evidence of harm to the environment (i.e., while there was still "uncertainty" about the evidence).[113]

It has been suggested that the precautionary principle might be described both in terms of the level of uncertainty that triggers a regulatory response and in terms of the tool that will be chosen in the face of uncertainty (as in the case of technological requirements or prohibitions).[114]

There is a need to actively engage the communities in environmental management and conservation in order to help in the implementation of these principles. With the communities empowered, then it is possible to hold to account those who flout environmental laws, be they entities or individuals.

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http://www.sehn.org/pdf/PrecautionaryPrincipleissuespaper.pdf [Accessed on 07/05/2022].

[111] Ibid, p.1.

[112] World Commission on the Ethics of Scientific Knowledge and Technology (COMEST), *The Precautionary Principle*, (United Nations Educational, Scientific and Cultural Organization, Paris, 2005), p.7. Available at *http://www.eubios.info/UNESCO/precprin.pdf* [Accessed on 07/05/2022]

[113] Hathcock, J.N., 'The Precautionary Principle–An Impossible Burden Of Proof for New Products,' *AgBioForum*, Vol. 3, No. 4, 2000, pp. 255-258, p.255.

[114] Sunstein, C.R., 'Beyond the Precautionary Principle,' University of Chicago Public Law and Legal Theory Working Paper No. 38, January 2003, p.11. Available at *http://www.law.uchicago.edu/files/files/38.crs_.precautionary.pl-lt.pdf* [Accessed on 07/05/2022].

It is easier to engage a community that feels a sense of belonging than one that feels sidelined by the state actors.

4. Enhanced Environmental Enforcement and Compliance for Sustainable Development in Kenya

Environmental protection is inherent in the concept of sustainable development, as is a focus on the sources of environmental problems rather than the symptoms.[115] While the existing laws seem to put great emphasis on enforcement of environmental responsibilities, there is little evidence of actual promotion of deterrence under the current environmental liability regime in Kenya.

Kenya Vision 2030 is the long-term development blueprint for the country, with various pillars that include environmental, economic, social and political pillars. The social pillar seeks to build a just and cohesive society that enjoys equitable social development in a clean and secure environment.[116] The Blueprint seeks to ensure that Kenya becomes a nation that has a clean, secure and sustainable environment by 2030, to be achieved through: promoting environmental conservation to better support the economic pillar's aspirations; improving pollution and waste management through the application of the right economic incentives; commissioning of public-private partnerships (PPPs) for improved efficiency in water and sanitation delivery; enhancing disaster preparedness in all disaster-prone areas and improving the capacity for adaptation to global climatic change.[117] Proper apportionment of environmental liability in the country will go a long way in ensuring that all stakeholders, both public and private play their role in achieving sustainable development agenda. Investing in compliance and enforcement of environmental laws benefits the public by securing a healthier and safer environment for themselves and their children. It also benefits individuals, firms and others in the regulated community by

[115] Ibid, para. 50.
[116] Sessional paper No. 10 of 2012, On Kenya Vision 2030, Government Printer, 2012.
[117] Ibid.

ensuring a level playing field governed by clear rules applied in a fair and consistent manner.[118]

Strengthening environmental compliance and enforcement requires renewed efforts by individuals and institutions everywhere. Government officials, particularly inspectors, investigators, and prosecutors, must exercise public authority in trust for all of their citizens according to the standards of good governance and with a view to protecting and improving public well-being and conserving the environment.[119] The judiciary has a fundamental contribution to make in upholding the rule of law and ensuring that national and international laws are interpreted and applied fairly, efficiently, and effectively.[120]

Courts also need to work closely with the public as a way of enhancing identification of activities that violate environmental laws as well as increasing the rate of enforcement and compliance with court decisions, by bodies and individuals.

There is also need to sensitise the public on the dangers of environmental degradation through pollution, overstocking, over-exploitation of resources. Other professionals should be brought on board. These may be drawn from such fields as medical, agricultural, mining, amongst others.

When people appreciate that the state of environmental health directly affects their livelihoods, it is possible to engage them in creation of a better environment that is clean and healthy as the first step towards improving their lives.

Concerted efforts from all the stakeholders, including the general public can ensure that the compliance and enforcement framework in place is used to

[118] International Network for Environmental Compliance and Enforcement (INECE), 'The Importance of Environmental Compliance and Enforcement for Sustainable Development for the Rio+20 Conference,' *op cit,* p.2.
[119] Ibid.
[120] Ibid.

promote and safeguard the right to clean and healthy environment as envisaged in the Constitution and environmental laws.

4.1 Encouraging Proactive Corporate Environmental Compliance

It has rightly been pointed out that virtually all companies face the possibility of environmental liability costs and as such, it is imperative for the management to make at a least a general estimate of their company's potential future environmental liability be it from legally mandated cleanup of hazardous waste sites or from lawsuits involving consumers, employees, or communities.[121] The gathered information, it is argued could be useful in the following ways: encourage defensive and prudent operations and waste reduction; improve manufacturing, waste disposal and shipping practices; negotiate and settle disputes with insurance carriers; influence regulators and public policy makers; determine suitable levels of financial resources; reassess corporate strategy and management practices (think green); articulate a comprehensive risk management program; improve public relations and public citizenship; and assess hidden risks in takeovers and acquisitions.[122]

It is advisable for companies and organisations to engage in proactive environmental risk management as part of their strategic plans in order to avoid costly environmental liability mistakes.[123]

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[121] Schoemaker, P. J., & Schoemaker, J. A., "Estimating environmental liability: Quantifying the unknown," *California Management Review*, Vol.37, no. 3 (1995): 29-61, at p.29.

[122] Ibid, at pp. 29-30.

[123] This is in line with the ISO 14000 which is a series of environmental management standards developed and published by the International Organization for Standardization (ISO) for organizations. The ISO 14000 standards provide a guideline or framework for organizations that need to systematize and improve their environmental management efforts. The ISO 14000 standards are not designed to aid the enforcement of environmental laws and do not regulate the environmental activities of organizations. Adherence to these standards is voluntary.
The ISO 14001 standard specifies the requirements of an environmental management system (EMS) for small to large organizations. An EMS is a systemic approach to handling environmental issues within an organization. The ISO 14001 standard is based on the Plan-Check-Do-Review-Improve cycle.

4.2 Due Diligence/Cultivating Environmental Ethics

Kenyans have a role to play in achieving the ideal of a clean and healthy environment. [124] There is need to cultivate a culture of respect for environment by all, without necessarily relying on courts for enforcing the same.[125] The citizenry should be able to practise preventive measures while allowing the courts to come in only in cases of violation of environmental standards. Developing environmental ethics and consciousness can be enhanced through adopting participatory approaches to conservation and management of environment and its resources. [126] Dissemination of information and knowledge in meaningful forms can also enhance participation in decision-making and enhance appreciation of the best ways of protecting and conserving the environment.[127]

There is, therefore, a need to encourage voluntary compliance with environmental regulations, by the general public. This can be achieved through creating public awareness on the impacts of unsustainable and environment-degrading production and social activities, while providing sustainable alternatives. Such awareness can include organizing public forums, use of media to disseminate information and environmental campaigns and introducing comprehensive and up-to date environmental studies in learning institutions, at all levels. Incentives and disincentives can

(ISO 14000 and 1400, https://whatis.techtarget.com/definition/ISO-14000-and-14001).

The ISO 14000 family of standards provides practical tools for companies and organizations of all kinds looking to manage their environmental responsibilities. ISO 14001:2015 and its supporting standards such as ISO 14006:2011 focus on environmental systems to achieve this. The other standards in the family focus on specific approaches such as audits, communications, labelling and life cycle analysis, as well as environmental challenges such as climate change.

(International Organization for Standardization, "ISO 14000 family - Environmental management," https://www.iso.org/iso-14001-environmental-management.html).

[124] Article 69(2), Constitution of Kenya.

[125] Preamble, Constitution of Kenya.

[126] Article 69(2), Constitution of Kenya.

[127] See generally, Muigua, K., *Realising Environmental Democracy in Kenya*, available at *http://kmco.co.ke/wp-content/uploads/2018/08/REALISING-ENVIRONMENTAL-DEMOCRACY-IN-KENYA-4th-May-2018-1-1*.pdf [Accessed on 07/05/2022].

also be offered to encourage people to discard unsustainable methods of production and other activities that contribute to the degradation of the environment. Environmental rules that reward environmental leadership, build on best practices, and ensure a level playing field are more likely to succeed in securing compliance.[128]

Sustainable development efforts may not bear much if the country does not move beyond laws. There is need for educating the public on the subject, with emphasis on preventive and conservation measures. The same should include change of attitude by the general public. The current generation has a responsibility and an environmental liability to ensure that future (unborn) generations have their future guaranteed. This responsibility was affirmed in the case of *Oposa et al. v. Fulgencio S. Factoran, Jr. et al (G.R. No. 101083)* (199) where the Supreme Court of the Philippines stated that even though the right to a balanced and healthful ecology is under the Declaration of Principles and State Policies of the Constitution and not under the Bill of Rights, it does not follow that it is less important than any of the rights enumerated in the latter: *"[it] concerns nothing less than self-preservation and self-perpetuation, the advancement of which may even be said to predate all governments and constitutions".* The right is linked to the constitutional right to health, is "fundamental", "constitutionalised", "self-executing" and "judicially enforceable". It imposes the correlative duty to refrain from impairing the environment.[129] The court stated that the petitioners were able to file a class suit both for others of their generation and for succeeding generations as *"the minors' assertion of their right to a sound environment constitutes, at the same time, the performance of their obligation to ensure the protection of that right for the generations to come."*[130]

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[128] International Network for Environmental Compliance and Enforcement (INECE), 'The Importance of Environmental Compliance and Enforcement for Sustainable Development for the Rio+20 Conference,' p.2, available at *http://www.uncsd2012.org/content/documents/332INECE%20Submission%20Rio%20Compilation%20Document.pdf* [Accessed on 07/05/2022].

[129] Oposa et al. v. Fulgencio S. Factoran, Jr. et al (G.R. No. 101083), https://www.escr-net.org/caselaw/2006/oposa-et-al-v-fulgencio-s-factoran-jr-et-al-gr-no-101083

[130] Ibid.

It is thus important to ensure that all persons are conscious of their responsibility and duty to future generations to eliminate environmental threats affecting life, health and the wellbeing of the generations to come in the spirit of intragenerational and intergenerational equity.

4.3 Environmental Insurance

Environmental insurance is one of the tools that is used in environmental management. However, EMCA does not have provisions touching on the same. In addition, Kenyan insurance firms are yet to popularise environmental insurance services. It is suggested that this is a service that they should take up especially in light of the sustainable development agenda. However, all is not lost as a few of the insurance providers have packages on environmental impairment liability, such as the AIG insurance whose package covers: third-party bodily injury; third-party property and environmental damage; and clean-up costs for pollution conditions, both on site or while migrating from site.[131] Environmental law practitioners may also advise their clients on the possibility of taking up environmental liability insurance. The closest that EMCA has in terms of state sponsored environmental insurance is the National Environment Restoration Fund, which is a state kitty meant to supplementary insurance for the mitigation of environmental degradation where the perpetrator is not identifiable or where exceptional circumstances require the Authority to intervene towards the control or mitigation of environmental degradation.[132] There is a need to popularize environmental insurance in the country for both medium and huge companies to shield them against environmental liability which could turn out to be too costly.

The basic considerations when buying environmental damage liability insurance have been summarized as follows: the nature and extent of the risk to be insured; the purposes the insurance is to serve; the available types of policies, scopes of coverage, deductibles, and prices; the extent to which the issues just noted are governed by mandatory governmental insurance

[131] https://www.aig.co.ke/commercial/products/liabilities/environmentalimpairment-liability
[132] S. 25(3), EMCA.

requirements (i.e., where being used to satisfy federal or state financial responsibility requirements); the importance of disclosures in answers to the warranty questions in the application form; the extent to which the actual scope of coverage in various competing policies serves the insured's purposes, given the nature and extent of the risks involved; the extent to which the rights of the insurance company under the policy may affect the client's freedom to pursue the appropriate regulatory or public relations strategy after an environmentally damaging release; the advantages and disadvantages of self-insurance; and the need for close coordination between legal counsel, environmental managers, and those in charge of insurance for the client on all of these matters.[133]

5. Conclusion

The environment should be accorded some right, independent of the human beings. Indeed, the Constitution of Kenya 2010 elevates the environment as worthy of protection by stating in the preamble that the People of Kenya are respectful of the environment, which is their heritage, and are determined to sustain it for the benefit of future generations. The constitutional recognition of this position in Kenya should give the law makers, courts and other stakeholders an incentive and clear authority to take strong action to protect the environment.

Strengthening the environmental liability regime in Kenya is necessary in order to enable the country to have a clean and healthy environment and to achieve sustainable development.

[133] Smith Jr, T.T., "Environmental Damage Liability Insurance—A Primer," *The Business Lawyer* (1983): 333-354, at p.336.

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Electoral Dispute Resolution Mechanisms in Kenya

Prof. Tom Ojienda, SC* and Lydia Mwalimu Adude**

Abstract

Electoral dispute resolution mechanisms are at the core of every electoral system and process that aims to further democracy and the principle of free and fair elections. This paper focuses on the electoral dispute resolution mechanisms in Kenya and incorporates relevant changes made to the electoral laws in that regard. The paper first considers the legal framework and principles underlying the electoral system in Kenya. It then considers the various pre-election and post-election dispute resolution mechanisms provided for in our electoral laws.

1 Introduction

Electoral dispute resolution (EDR) is the hallmark of any electoral system and process that is built to further *democracy* and *the principle of free and fair elections*. Electoral disputes can occur pre-election or post-election thus giving rise to the need for both pre-election EDR mechanisms and post-election EDR mechanisms. EDR mechanisms in Kenya are provided for under the Constitution of Kenya, 2010 (the Constitution), electoral statutes and regulations, and political party documents such as political party constitutions, nominations and primaries' rules, and coalition agreements; the electoral laws. EDR mechanisms are administrative and quasi-judicial, especially as pertains to intra-party pre-election disputes, as well as judicial, mostly as concerns post-election disputes.

Effective EDR mechanisms are *central in ensuring a peaceful and credible electoral process* and must, therefore, be able to deal with any form of challenge that may arise due to a disputed electoral process and outcome. As a consequence, it is imperative that the administrative, quasi-judicial, and judicial bodies mandated to hear and determine electoral disputes adjudicate the process in a free and fair manner pursuant to *article 50(1) of the*

Constitution.[1] In *Moses Mwicigi* & 14 others v Independent Electoral and Boundaries Commission & 5 others,[2] the Supreme Court was categorical that:

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Party) [2019] eKLR (Petition No 7 of 2018); Martin Wanderi & 106 others v Engineers Registration Board & 10 others [2018] eKLR (Petition No 19 of 2015); Moi v Rosanna Pluda [2017] eKLR; Town Council of Awendo v Nelson O. Onyango & 13 others; Abdul Malik Mohamed & 178 others (Interested Parties) [2019] eKLR (Petition No 37 of 2014); Wilfrida Arnodah Itolondo v Attorney General & 9 others [2021] eKLR (Application No 3 of 2021 (E005 of 2021)); and Speaker Nairobi City County Assembly & another v Attorney General & 3 others (Interested parties) [2021] eKLR (Advisory Opinion Reference No 1 of 2020), among many others available at www.proftomojiendaandassociates.com.

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> One of the objectives of our Constitution is the establishment of firm institutions, that have a pivotal role in its implementation. Our electoral dispute-resolution regime has a continuum of institutions that require strengthening, through the judicial system: namely, the political parties; the Political Parties Disputes Tribunal; and the IEBC. These have to comply with the Constitution, and the electoral laws and regulations.'[3]

The administrative and quasi-judicial EDR mechanisms in Kenya are the political parties' internal dispute resolution mechanisms (IDRM), the Independent Electoral and Boundaries Commission (IEBC) mechanisms (these are, the Dispute Resolution Committee, the Electoral Code of Conduct Enforcement Committee, and the Constituency Peace Committees), and the Political Parties Disputes Tribunal (PPDT).[4] Judicial EDR mechanisms means the elections courts which are vested with special electoral jurisdiction, that is, designated Resident Magistrates' Courts, the High Court, the Court of Appeal, and the Supreme Court of Kenya when sitting as such.

- N.B.: An extract of this paper focusing on the management of team dynamics in election petitions, and having been specially adapted for a presentation to the Law Society of Kenya (LSK) during the LSK Colloquium on Electoral Laws and Practice held in Malindi on 9-10 December 2021, was published; Prof. Tom Ojienda, SC, 'Electoral Dispute Resolution: Managing Team Dynamics in Election Petitions' (2021) Journal of Conflict Management and Sustainable Management, Vol 7, Issue 4, ISBN: 978-9966-046-15-4, pp 1-28.

[1] Article 50(1) of the Constitution guarantees the right to a fair hearing and provides that, 'Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.'
[2] [2016] eKLR, SCoK Pet No 1 of 2015.
[3] Para 121.
[4] On 25 April 2022, the Chief Justice announced that PPDT, which has solely been based in Nairobi since its inception, has been decentralized to other parts of the country for ease of access to electoral justice and to ensure cost-effective, convenient and timely resolution of pre-electoral disputes, that is, in law courts in Nairobi (Milimani Law Courts), Kisumu, Meru, Mombasa, Kakamega, Nyeri, and Eldoret. The Chief Justice also unveiled an e-filing system to aid with the online filing of cases at the PPDT.

This paper considers the entirety of EDR mechanisms in Kenya. The paper first considers the legal framework and principles that underlie the electoral system in Kenya and thereafter considers the pre-election and post-election dispute resolution mechanisms. Lastly, the paper looks into the parameters and tools for managing team dynamics in election petitions as pertains to the litigation of electoral disputes.

2. The Legal Framework and Principles that Underlie the Electoral System in Kenya

This part of the paper will consider the legal framework and principles that inform Kenya's electoral system, and from which the various mechanisms for the resolution of electoral disputes are derived.

2.1 The Legal Framework on the Electoral System

The legal framework on the electoral system in Kenya and the resolution of electoral disputes is drawn from the Constitution and the various electoral statutes and regulations made thereunder, which together form the bulk of Kenya's electoral laws.[5] We will consider each of these laws below.

2.1.1. Constitution of Kenya, 2010

Chapter seven (articles 81-92) of the Constitution is dedicated to the representation of the people. *Part 1 of chapter seven (articles 81-87) of the Constitution* entails specific provisions on the electoral system and process in Kenya. *Article 82(1)(b) and (d) of the Constitution* empowers Parliament to enact legislation to provide for the nomination of candidates, and the conduct, regulation and efficient supervision of elections and referenda, including the nomination of candidates for elections.

The Independent Electoral and Boundaries Commission (IEBC) established under *article 88(1) of the Constitution* is responsible for the settlement of electoral disputes, including disputes relating to or arising from nominations,

[5] Para 2 of the Electoral Code of Conduct, second schedule of the Elections Act, 2011 defines *'electoral laws'* to mean *'the Constitution, the Elections Act and subsidiary legislation made thereunder as they relate to the presidential, parliamentary, county elections and the referendum.'*

but excluding election petitions and disputes subsequent to the declaration of election results.[6] IEBC is also responsible for the regulation of the process by which parties nominate candidates for elections; the regulation of the amount of money that may be spent by or on behalf of a candidate or party in respect of any election; the development of a code of conduct for candidates and parties contesting elections; and the monitoring of compliance with the legislation required by *article 82(1)(b) of the Constitution* relating to nomination of candidates by parties.[7] The Constitution requires all candidates and all political parties in every election to comply with the electoral code of conduct prescribed by IEBC.[8]

Article 87 of the Constitution is particular on electoral disputes and is coached towards *expeditious resolution of electoral disputes.* Parliament is required to enact legislation to establish mechanisms for timely settling of electoral disputes.[9] Election petitions, other than a presidential election petition, are to be filed within twenty-eight (28) days after the declaration of the election results by IEBC.[10] Service of an election petition may be direct or by advertisement in a newspaper with national circulation.[11] *Articles 140, 163(3)(a), and 165(5)(a) of the Constitution* on the other hand, give the Supreme Court exclusive original jurisdiction to hear and determine disputes relating to presidential elections, that is, elections to the office of President.[12]

[6] Ibid art 88(4)(e).
[7] Ibid art 88(4)(d), (i), (j) and (k).
[8] Ibid art 84.
[9] Ibid art 87(1).
[10] Ibid art 87(2).
[11] Ibid art 87(3).
[12] See Constitution of Kenya, 2010, arts 136-140 (concern election of the president; qualifications and disqualifications for election as president; procedure at presidential election; procedure to be followed in case of death of a president-elect after being declared elected as president, but before assuming office; and questions as to validity of presidential election, respectively).

2.1.2 Independent Electoral and Boundaries Commission Act, 2011[13]

The IEBC Act, 2011 implements the constitutional provisions that pertain to the role of IEBC in the electoral process and the delimitation of electoral boundaries in Kenya, including its role in the resolution of electoral disputes. *Section 4 of the Act* reiterates the functions of IEBC under *article 88(4) of the Constitution.*

2.1.3 Political Parties Act, 2011[14]

First and foremost, *section 38I of the Political Parties Act, 2011* recognizes the role of a political party's internal dispute resolution mechanisms in the resolution of pre-election disputes. The section requires political parties to resolve any disputes arising from party nominations within thirty (30) days after the date of the party nominations. After exhausting a political party's internal dispute resolution mechanisms, an aggrieved party can seek recourse in the quasi-judicial EDR mechanisms.

Part V (sections 39-44) of the Political Parties Act, 2011 establishes the *Political Parties Disputes Tribunal (PPDT***)** and makes provision for its jurisdiction and workings.[15] *Section 40(1) of the Political Parties Act, 2011*, clothes PPDT with jurisdiction to hear and determine the following disputes:

(a) disputes between the members of a political party;
(b) disputes between a member of a political party and the political party;
(c) disputes between political parties;
(d) disputes between an independent candidate and a political party;
(e) disputes between coalition partners;
(f) appeals from decisions of the Registrar under the Political Parties Act, 2011; and

[13] Act No 9 of 2011, Laws of Kenya (assented to on 5 July 2011 and obtained the force of law on the same day).
[14] Act No 11 of 2011, Laws of Kenya (assented to 27 August 2011 and obtained the force of law on 1 November 2011).
[15] Political Parties Act, 2011, s 39(1).

(fa) disputes arising out of party nominations.

By virtue of *section 40(2) of the Political Parties Act, 2011*, disputes between members of a political party, disputes between a member of a political party and the political party, disputes between political parties, disputes between coalition partners, and disputes arising out of party nominations must first be subjected to the internal political party dispute resolution mechanisms before one can approach PPDT.

In tandem with *article 87(1) of the Constitution, section 41(1) of the Political Parties Act, 2011* embraces *the principle of expeditious resolution of electoral disputes* and the Tribunal shall determine any dispute before it within *three (3) months* from the date the dispute is lodged. Appeals from decisions of the Tribunal lie in the High Court on both points of law and facts and a further final appeal lies in the Court of Appeal on points of law only.[16] A decision of the Tribunal is enforced in the same manner as a decision of a Magistrate's Court, however, the Tribunal is also clothed with similar powers as those of the High Court to punish for contempt.[17]

2.14 Elections Act, 2011[18]

Part VII (sections 74-87) of the Elections Act, 2011 specifically entails provisions on election disputes resolution. The Act makes provision for settlement of pre-election and post-election disputes. First, *section 74(1) of the Act* acknowledges the constitutional and statutory mandate of IEBC – under *article 88(4)(e) of the Constitution* and *section 4(e) of the IEBC Act, 2011* – to settle pre-election disputes, including disputes relating to or arising from nominations. IEBC has no mandate to settle election petitions and disputes subsequent to the declaration of election results. Electoral disputes brought before IEBC are to be determined within ten (10) days of being

[16] Political Parties Act, 2011, s 41(2). Initially, appeals on points of law would proceed to the Supreme Court from the Court of Appeal, however, this changed with the enactment into law of the Political Parties (Amendment) Act, 2022 (Act No 2 of 2022, Laws of Kenya).
[17] Ibid s 41(3).
[18] Act No 24 of 2011, Laws of Kenya (assented to on 27 August 2011 and obtained the force of law on 2 December 2011).

lodged with the Commission.[19] However, where such a dispute relates to a prospective nomination or election, the dispute is to be determined before the date of the nomination or election as applicable.[20] The *IEBC Dispute Resolution Committee* has heard and determined a number of pre-election disputes arising in relation to *the 2013 and 2017 general elections*.[21]

As concerns post-election petitions, the Elections Act, 2011 entails procedures for settlement of disputes in relation to the various elective posts in respect of parliamentary and county elections. *Section 75 of the Elections Act, 2011* is particular on *county election petitions.* One, *a question as to the validity of an election of a county governor* is to be determined by *the High Court* within the county or nearest to the county.[22] The High Court is to hear and determine the matter within six (6) months of the date of lodging the petition.[23] Two, *a question as to the validity of the election of a member of a county assembly* is to be heard and determined by *the Resident Magistrate's Court* designated by the Chief Justice.[24] Thereafter, an appeal lies to the High Court on matters of law only, which appeal must be filed within thirty (30) days of the decision of the Magistrate's Court, and is to be heard and determined within six (6) months from the date of filing the appeal.[25] The reliefs that a court can grant in respect of county election petitions include: a declaration of whether or not the candidate whose election is questioned was validly elected; a declaration of which candidate was validly elected; or an order as to whether a fresh election will be held or not.[26]

[19] Elections Act, 2011, s 74(2).
[20] Ibid s 74(3).
[21] See Independent Electoral and Boundaries Commission (IEBC) and Electoral Institute for Sustainable Democracy in Africa (EISA-Kenya), 'Case Digest: Decisions of the IEBC Dispute Resolution Committee' <https://www.eisa.org/pdf/eh2014ken.pdf> (on the 2013 general elections).
[22] Elections Act, 2011, s 75(1).
[23] Ibid s 75(2).
[24] Ibid s 75(1A).
[25] Ibid s 75(4).
[26] Ibid s 75(3).

2.1.5 Election Campaign Financing Act, 2013[27]

Section 21 of the Election Campaign Financing Act, 2013 empowers IEBC to determine complaints regarding breaches of this Act. A person alleging a breach of the Act may lodge a complaint with IEBC, and IEBC may investigate breaches of the Act. Upon a complaint being filed or a breach under the Act being detected, IEBC is to hear and determine that complaint within seven (7) days, if filed before an election, or within fourteen days, if filed after an election.[28] Subject to its *section 4*, the Act clothes IEBC with court-like powers in determining a complaint including the power to request for the attendance of any person believed to have information related to the complaint, and to call for any information believed to be relevant in the determination of the complaint.[29]

If IEBC finds that there is a breach of any provision of the Election Campaign Financing Act, 2013, *section 21(5) of the Act* empowers IEBC to make any of the following orders:

(a) order the rectification of any record;
(b) issue a formal warning;
(c) impose a fine as may be specified under the regulations;
(d) prohibit the errant candidate, political party or referendum committee from campaigning for a specified period or within a specified area;
(e) prohibit media coverage of the errant candidate, political party or referendum committee within a specified period; or
(f) disqualify the errant candidate, political party or referendum committee from contesting in that election or referendum, as the case may be.

If an offence is discovered after an election and an order of disqualification is made, the candidate or the political party will be disqualified from

[27] Act No 42 of 2013, Laws of Kenya.
[28] Election Campaign Financing Act, 2013, s 21(3).
[29] Ibid s 21(4).

contesting in the subsequent by-election or general election.[30] An order of disqualification so made is to be registered in the High Court, in the case of presidential, parliamentary, governor elections or referendum, and is registered in the resident magistrate's court in the case of county assembly elections.[31]

In addition to the Constitution and the above statutes, also consider the *Election Offences Act, 2016*,[32] the *Election Laws (Amendment) Act, 2016*,[33] and the *Election Laws (Amendment) Act, 2017*.[34]

2.2 The Principles of the Electoral System

Political rights are enshrined under *article 38 of the Constitution*. Every citizen is free to make political choices, which include the right to form, or participate in forming, a political party and to participate in the activities of, or recruit members for, a political party.[35] Further, every citizen has the right to free, fair and regular elections based on universal suffrage and the free expression of the will of the electors for any elective public body or office established under the Constitution; or any office of any political party of which the citizen is a member.[36] Furthermore, every adult citizen has the right, without unreasonable restrictions, to be registered as a voter, to vote by secret ballot in any election, and to be a candidate for election to public office, or office within a political party of which the citizen is a member and, to hold office if elected.[37]

Article 81 of the Constitution also provides for *the general principles for the electoral system*, which guide the election process. The principles that

[30] Ibid s 21(6).
[31] Ibid s 21(7).
[32] Act No 37 of 2016, Laws of Kenya (assented to on 13 September 2016 and came into operation on 4 October 2016).
[33] Act No 36 of 2016, Laws of Kenya (assented to on 13 September 2016 and came into operation on 4 October 2016).
[34] Act No 34 of 2017, Laws of Kenya (assented to on 28 October 2017 and came into force upon publication in the *Gazette*).
[35] Constitution of Kenya 2010, art 38(1).
[36] Ibid, art 38(2).
[37] Ibid art 38(3).

underlie Kenya's electoral system include: freedom of citizens to exercise their political rights under *article 38 of the Constitution*;[38] free and fair elections by secret ballot, free from violence, intimidation, improper influence or corruption, conducted by an independent body, transparent, and administered in an impartial, neutral, efficient, accurate and accountable manner; [39] and universal suffrage based on the aspiration for fair representation and equality of vote.[40] The electoral system in Kenya must also comply with the principle that not more than two-thirds of the members of elective public bodies shall be of the same gender, and the principle of fair representation of persons with disabilities.[41]

Moreover, the *basic requirements for political parties* under *article 91 of the Constitution* require every political party to *inter alia* have a democratically elected governing body; abide by the democratic principles of good governance, promote and practise democracy through regular, fair and free elections within the party; respect the right of all persons to participate in the political process; respect and promote human rights and fundamental freedoms; and subscribe to and observe the code of conduct for political parties. In addition, a political party is prohibited from *inter alia* engaging in or encouraging violence by, or intimidation of, its members, supporters, opponents or any other person.[42]

It then follows that there is a defined, free and fair electoral justice system to deal with any electoral or political disputes as and when they arise at every stage of the electoral process, by reference to the EDR mechanisms put in place under our legal framework on elections. We will now consider the EDR mechanisms for resolving the two categories of election disputes, pre-election disputes and post-election disputes.

[38] Ibid art 81(a).
[39] Ibid art 81(e).
[40] Ibid, art 81(d)
[41] Ibid art 81(b) and (c).
[42] Ibid art 91(2)(b).

3. Pre-election Dispute Resolution Mechanisms

As indicated earlier, electoral disputes arise at all stages of the electoral process, before and after the election exercise itself. As a result, administrative, quasi-judicial, and judicial EDR mechanisms have been put in place to address the challenges and disputes arising in the course of the electoral process. For a long time, the judicial system in its untweaked state (to cater to the specific and timely demands of electoral justice) was considered to be the only avenue for resolving electoral disputes. In essence, candidates who felt aggrieved not only with the actual electoral outcomes but also party primaries and nominations would only seek redress in courts, through 'election petitions.' However, the process proved messy and overwhelming to the judicial system as candidates flocked the courts with many cases disputing both the political party nominations and the elections.

The 2010 Constitutional dispensation relieved the judicial system from the shock of being overwhelmed with electoral disputes by giving aggrieved parties alternative avenues to settle electoral disputes, especially pre-election disputes. As a result, courts only handle appeals arising in respect of pre-election disputes and have special jurisdiction as election courts to handle election petitions which only occur after the election exercise. The legal framework and mechanisms for intra-party and pre-election dispute resolution in Kenya is thus grounded on the Constitution of Kenya, 2010 and the implementing electoral statutes, that is, the Elections Act, 2011, the Political Parties Act, 2011, the IEBC Act, 2011, the Election Campaign Financing Act, 2013, and the Election Offences Act, 2016.

3.1 Pre-election Disputes

Pre-election disputes include disputes within and between political parties; electoral offences and illegal practices; voter registration disputes; disputes arising from the nomination of candidates; and disputes relating to violation(s) of the Electoral Conduct Code of Conduct.[43]

[43] See the Judiciary Working Committee on Election Preparations, 'Pre-election Dispute Management: Between Judicial And Administrative Dispute Management Mechanisms' (Kenya Law Blog; 17 September 2012) <http://kenyalaw.org/kenyalawblog/pre-election-dispute-management-between-judicial-and-administrative-dispute-management-mechanisms/>.

3.1.3 Disputes Within and Between Political Parties

Disputes within political parties concern disputes between members of a political party, disputes between a political party and a member(s) of the political party, and disputes between a political party and an independent candidate. Disputes within political parties often arise in relation to the registration of members, nominations and primaries, and the listing of the names of candidates nominated to vie for elective posts under the party's ticket. In ensuring that such disputes are settled in a fair manner, *article 47 of the Constitution* provides that very person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. On the other hand, disputes between political parties refer to any dispute between one or more political parties or disputes between coalition partners and these are often resolved through mechanisms external to any one political party or in accordance with a coalition agreement as applicable.

As already indicated, **Part V of the Political Parties Act, 2011** establishes the Political Parties Disputes Tribunal (PPDT) and gives it jurisdiction to determine various kinds of disputes. These include; disputes between the members of a political party, between a member of a political party and a political party, between political parties, between independent candidates and a political party, disputes arising out of party primaries among others.[44]

Furthermore, the **Political Parties Disputes Tribunal (Procedure) Regulations, 2017** provides for the procedure for the determination of disputes before the Tribunal as well as a timeline whereby a complaint against the decision by a political party ought to be lodged, within fourteen (14) days from the date of the decision.[45] In ***Gabriel Bukachi Chapia v ODM & Another***,[46] the Court of Appeal held that:

> In effect the PPDT should not entertain disputes between members of a political party, disputes between a member of a

[44] Political Parties Act, 2011, s 40(1).
[45] Political Parties Disputes Tribunal (Procedure) Regulations, 2017, reg 7 and 8.
[46] [2017] eKLR, CoA (Nairobi), Civil Appeal No 168 of 2017 (Nambuye, Musinga & Gatembu, JJA).

> political party and a political party, disputes between political parties and disputes between coalition partners, unless such dispute is in the first instance heard and determined by the internal political party dispute resolution mechanism.[47]

3.1.4 Disputes Relating to Voter Registration

Article 83(1) of the Constitution gives the minimum requirements for a person to be registered as a voter in Kenya; must be an adult citizen, is not declared to be of unsound mind, and has not been convicted of an election offence during the preceding five years. Although the article is categorical that one can only be registered as a voter at only one registration centre,[48] it goes on to specifically provide that any administrative arrangements for the registration of voters and the conduct of elections must be designed to facilitate and not deny an eligible voter the right to vote or stand for election.[49]

Section 11 of the Elections Act, 2011 provides that any dispute as to whether a person is qualified to be registered as a voter is to be determined in accordance with **Part II of the Act (sections 3-12)**.[50] Disputes under Part II of the Act also relate to the maintenance of the register of voters, registration of voters, disqualification of a person from registration as a voter, inspection of the register of voters by members of the public, rectification of a voter's details in the register, the transfer of registration to an electoral area other than the one the voter is registered in, and claims where a person has duly applied to be registered as a voter but their name is not reflected in the register of voters.[51]

[47] Ibid para 28.
[48] Constitution of Kenya, 2010, art 83(2)
[49] Ibid art 83(3).
[50] Elections Act, 2011, s 11.
[51] Ibid ss 4-9, and 12,

In ***John Harun Mwau & 2 others v Independent Electoral and Boundaries Commission & 2 others***,[52] the Supreme Court stressed the significance of voter registration when the court opined that:

> It is our perception that, the issue of a Voters' Register when raised in any election proceedings, is a primary issue for determination. Registration of voters is also a constitutional imperative, by Article 83 of the Constitution which outlines the prerequisites of voter registration. (…) Registration facilitates the effectuation of the right to vote. **Article 38(3)(a)** decrees that every adult citizen has a right, without unreasonable restrictions, to be registered as a voter. As such, the right to vote cannot be fully enjoyed if the registration of voters is not properly conducted.[53]

3.1.5 Disputes Arising from Nomination of Candidates

Nomination means the submission to IEBC of the name of a candidate in accordance with the Constitution and the **Elections Act, 2011**.[54] **Articles 99, 137, and 180 of the Constitution** are relevant as concerns the qualifications for a person to be nominated by a political party as a candidate for Parliamentary elections, Presidential elections, gubernatorial elections, respectively. **Part IVA (sections 38A-38I) of the Political Parties Act, 2011** entails provisions pertaining to the conduct of party nominations and the internal resolution of party nominations disputes.

Section 13 of the Elections Act, 2011 provides for the process for nomination of candidates for elections by a political party. A political party is required to nominate its candidates for an election at least ninety (90) days before a general election and it cannot change the name of a nominated candidate after the nomination of that person has been received by IEBC. Prior to submitting the nomination papers to IEBC, as applicable, a political

[52] [2017] eKLR, SCoK, Pet Nos 2 & 4 of 2017 (consolidated) (11 December 2017, Maraga, CJ & P, Mwilu, DCJ & V-P, Ojwang, Wanjala, Njoki Ndung'u and Lenaola, SCJJ).
[53] Ibid paras 354 and 355.
[54] Elections Act, 2011, s 2.

party can only change the name of a nominated candidate on account of death, resignation or incapacity of the nominated candidate or on account of the nominated candidate having violated the Electoral Code of Conduct, but subject to prior notice being given to the affected candidate. Further provisions regarding nominations and the qualifications and disqualifications of candidates for nominations for presidential, parliamentary and county elections are contained in **sections 22 to 26 and 31 of the Elections Act, 2011**. As such, it is commonplace for disputes to arise as a result of party nominations, hence the necessity for just, convenient, affordable and expeditious EDR mechanisms to cater to such disputes.

It is worth noting that the Constitution stipulates that every political party shall abide by the democratic principles of good governance, and promote and practice democracy through regular, fair and free elections within the party.[55] Disputes regarding the fairness of party nominations of candidates have far reaching effect in that the consequence of not adhering to what the Constitution demands can lead to the deregistration of a political party.[56] Regarding the settling of nominations disputes, it was stated in the case of ***Hafidmaalim Ibrahim & another v Economic Freedom Party & 3 other***,[57] which concerned the nominated members for the County Assembly of Mandera County under **article 90 of the Constitution**, that:

> Any dispute relating to or arising from these nominations ought to have been settled by the Commission before the date of the nominations as provided by the law. It is therefore the IEBC who had jurisdiction to settle the petitioners' dispute. There is no evidence that they lodged their disputes with the legally mandated body before coming to this court. The petitioners have not given any reasons why they did not and I cannot find any other reason but to assume that they are forum shopping. Having failed to lodge [their] dispute with the Commission before the date of the

[55] Constitution of Kenya, 2010, art 91(1)(d)
[56] Political Parties Act, 2011, s 21(1)(b).
[57] [2018] eKLR, SRM (Mandera), Election Pet Nos 2 & 5 (consolidated).

> nominations as is required by law I find their petitions herein are not properly before this court and are otherwise an abuse of the process of court.

It is worth noting that on the one hand there are party nominations conducted by political parties for candidates to be elected by voters on the party's ticket (election by voters). On the other hand, political parties also conduct nominations of persons into public office through political party lists submitted to IEBC under **article 90 of the Constitution** (election by nomination).[58] IEBC has jurisdiction to hear such nominations disputes prior to the nominations exercise itself.[59]

In the case of political party lists under **article 90 of the Constitution**, **section 36(4) of the Elections Act, 2011** stipulates that, '*Within thirty days after the declaration of the election results, the Commission shall designate, from each qualifying list, the party representatives on the basis of proportional representation.'* Pursuant to **section 35A of the Elections Act, 2011** before submitting the party lists to the Commission, the Registrar of Political Parties must certify that the names appearing in those party lists belong to registered members of the subject political party. **Any dispute in respect of certification of party lists is to addressed by PPDT**.[60] However, subsequent to the submission of the party lists to IEBC and following the declaration of the results of the election, any dispute thereby arising to challenge the validity of the party lists or the nomination itself will be addressed by the courts by way of an election petition.[61]

3.1.6 Electoral Offences and Illegal Practices

Political mischief perpetrated by political parties, their officials and IEBC to unfairly favour one candidate over the others may also lead to disputes by the aggrieved candidates. Electoral offences and illegal practices may thus be perpetrated by the said political parties, their officials and IEBC staff.

[58] Elections Act, 2011, ss 34-37.
[59] Ibid s 74.
[60] Ibid s 35A(3).
[61] Ibid s 74(1).

Some offences that may be committed in such cases relate to the register of voters, multiple registrations as a voter, voting, offences by members and staff of IEBC, voter impersonation, bribery, undue influence, and use of violence, among others.[62]

In ***Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 others; Ahmed Ali Muktar (Interested Party***),[63] the Supreme Court noted the perpetration of election offences by IEBC officers in failing to sign the election results declaration forms and the court held that:

> Among the irregularities found was the failure to sign the result declaration Forms 37A in several polling stations. I concur with the trial Court that the candidates' or their respective agents' failure to sign those forms is excusable under Regulation 79 of the Regulations, but that of the presiding or deputy presiding officer is not. The failure by the presiding or the deputy presiding officer to sign the result declaration form is not only a criminal offence under section 6 (j) of the Election Offences Act, but it also renders such Forms worthless.[64]

3.1.7 Disputes Relating to Breaches of the Electoral Code of Conduct

Article 84 of the Constitution and **section 110 of the Elections Act, 2011** require that in every election, all candidates and political parties must subscribe to and comply with the code of conduct prescribed by IEBC. The Electoral Code of Conduct is set out in the **Second Schedule of the Elections Act, 2011** and it entails the promotion of gender equality, ethnic tolerance, cultural diversity, and fair representation of special interest groups, and the prevention of violence and intimidation, among others. Any party who feels that the Electoral Code of Conduct has been breached may lodge a complaint with IEBC, that is, the Electoral Code of Conduct Enforcement Committee (ECCEC) and IEBC is empowered to handle such

[62] Election Offences Act, 2016 (Act No 37 of 2016).
[63] [2019] eKLR, SCoK, Pet No 7 of 2018, (Maraga, CJ & P, Ibrahim, Ojwang, Wanjala, Njoki & Lenaola, SCJJ)).
[64] Ibid para 188.

complaints and impose penalties and even institute proceedings in the High Court for breaches of the Code as appropriate.[65]

3.2 Pre-election Dispute Resolution Mechanisms

3.2.3 The Independent Electoral and Boundaries Commission (IEBC)

IEBC is established under **article 88(1) of the Constitution**. The Commission is constitutionally mandated to conduct or supervise referenda and elections to any elective body or office and any other elections as prescribed by an Act of Parliament.[66] IEBC is also mandated with regulating the process of nomination of candidates for elections by political parties, as well as monitoring compliance with the legislation relating to nomination of candidates.[67]

One of the main functions of IEBC as provided in **article 88(4)(e) of the Constitution** and **section 4(e) of the IEBC Act, 2011** is the settlement of electoral disputes, including disputes relating to or arising from nominations.[68] IEBC has no mandate to settle election petitions and disputes subsequent to the declaration of election results.[69] Disputes submitted to IEBC are to be determined within ten (10) days of the lodging of the dispute with IEBC.[70] However, disputes relating to a prospective nomination or election shall be determined before the date of the nomination or election, as applicable.[71] As noted earlier, the **IEBC Dispute Resolution Committee** has heard and determined a number of pre-election disputes in relation to the 2013 and 2017 general elections in Kenya.

In addition, IEBC is responsible for the enforcement of the **Electoral Code of Conduct** set out in the **second schedule of the Elections Act, 2011**.[72] The

[65] See Electoral Code of Conduct, paras 7-12 and 19.
[66] Constitution of Kenya, 2010, art 88(4).
[67] Ibid art 88(4)(d) and (k).
[68] Elections Act, 2011, s 74(1).
[69] Ibid.
[70] Ibid s 74(2).
[71] Ibid s 74(3).
[72] Ibid ss 51(6) and 110(1).

Electoral Code of Conduct is intended to promote conditions conducive to the conduct of free and fair elections and a climate of political tolerance which allows for political activities to take place without fear, coercion, intimidation or reprisals.[73] In respect to elections, the Code binds the Government, every political party, leader, office bearer, agent and member of a political party or a person who supports a political party, and every candidate nominated under the electoral laws for any election.[74] The Electoral Code of Conduct applies in the case of a general election, from the date of publication of a notice of election until the swearing in of newly elected candidates, and in the case of a by-election, from the date of declaration of a vacancy until the swearing in of elected candidates.[75]

Any person may complain to IEBC about the breach of the Electoral Code of Conduct.[76] IEBC is mandated to set up two entities with a role in the enforcement of the Electoral Code of Conduct; the **Electoral Code of Conduct Enforcement Committee (ECCEC)**,[77] and the **Constituency Peace Committees**[78].[79] ECCEC, which must comprise of not less than five members of IEBC, is chaired by a member appointed by the IEBC Chairperson. The Committee receives complaints alleging infringement of the Electoral Code of Conduct.[80] The Committee then issues summons to persons and political parties complained against to attend its meetings in a bid to address the said complaint.[81] The Committee is not bound by the provisions of the Criminal Procedure Code (Cap 75) or the Evidence Act (Cap 80) in its proceedings, but every person who is summoned and attends

[73] See paras 3, 5 and 6 of the Electoral Code of Conduct, second schedule of the Elections Act, 2011.
[74] Ibid para 1.
[75] Ibid para 18.
[76] Ibid para 19.
[77] Ibid para 15.
[78] Ibid para 17.
[79] See the Judiciary Working Committee on Election Preparations, 'Pre-election Dispute Management: Between Judicial And Administrative Dispute Management Mechanisms' (Kenya Law Blog; 17 September 2012) <http://kenyalaw.org/kenyalawblog/pre-election-dispute-management-between-judicial-and-administrative-dispute-management-mechanisms/>.
[80] Electoral Code of Conduct, para 15.
[81] Ibid para 15(4).

the meetings of ECCEC has a right to be heard. The Committee is required to deliver its verdict expeditiously - which includes punishing the person found to have infringed the Code - and to inform the parties of its decision. ECCEC also examines and determines complaints not resolved satisfactorily by the Constituency Peace Committees. The Constituency Peace Committees are mandated to investigate issues and allegations of election malpractice arising during the election period, reconcile warring parties, mediate political disputes in the constituencies, liaise with the government security agencies in the constituency and report suspected election malpractices, and report any violation of the Electoral Code of Conduct to ECCEC for appropriate action.[82]

Where in the opinion of ECCEC there has been an infringement of the Electoral Code of Conduct by any political party, the leader, office bearer, or member of a political party or a person who supports a political party, or any candidate, IEBC as part of its functions may issue a formal warning, a fine determined by it, an order prohibiting the political party from utilizing public media, permanently or for a specified period, or from erecting placards or banners or publishing and distributing campaign literature, among other sanctions.[83]

3.2.4 Political Parties Disputes Tribunal (PPDT)

PPDT is established under the Political Parties Act, 2011 and its members are appointed by the Judicial Service Commission (JSC).[84] As mentioned earlier, the jurisdiction of the Tribunal is provided under **section 40 of the Political Parties Act, 2011**, which includes the mandate to resolve disputes between the members of a political party; disputes between a member of a political party and the political party; disputes between political parties; disputes between an independent candidate and a political party; disputes between coalition partners; appeals from the decision(s) of the Registrar under the Political Parties Act; and disputes arising out of party

[82] Ibid para 17(3).
[83] Ibid para 7.
[84] Political Parties Act, 2011, s 39.

nominations.[85] Furthermore, other than disputes between an independent candidate and a political party and appeals from the decisions of the Registrar under the Political Parties Act, the Act stipulates that parties must have exhausted the internal political party dispute resolution mechanisms as a prerequisite to activating the jurisdiction of PPDT.[86]

Disputes being heard by the Tribunal must be determined expeditiously and no later than three (3) months from the date the dispute is lodged by the complainant.[87] As a quasi-judicial mechanism, PPDT applies the rules of evidence and procedure under the Evidence Act (Cap 80) and the Civil Procedure Act (Cap 21) with necessary modifications, but without paying undue regard to procedural technicalities.[88] Decisions of PPDT are enforced in the same manner as a decision of a Magistrate's Court.[89] It is worth noting that the Tribunal's decision is not final and therefore, parties feeling aggrieved can appeal the said decision at the High Court on points of law and facts. A further final appeal on points of law only lies at the Court of Appeal.[90]

On the issue of what would happen if a party failed to activate the existing internal political party dispute resolution mechanisms, in a ruling delivered on 14 December 2011 in the case of ***Stephen Asura Ochieng & 2 others v Orange Democratic Movement Party & 2 others***,[91] Mumbi Ngugi J expressed herself in the manner that:

> The question that arises is this: can it be properly argued that a dispute cannot be referred for determination to the Political Parties [Disputes] Tribunal because the political party has failed or refused to activate the internal party dispute resolution mechanism, thus leaving an aggrieved party with no option but

[85] Ibid s 40(1).
[86] Ibid s 40 (2).
[87] Ibid s 41 (1).
[88] Ibid s 41 (4).
[89] Ibid s 41 (3).
[90] Ibid s 41 (2).
[91] [2011] eKLR, HC (Nairobi), Pet No 288 of 2011.

> to turn to the High Court for redress? I think not. To hold otherwise would mean that parties could, by failing to resolve disputes internally, frustrate the operations of the Tribunal and render it totally redundant. **[12] To my mind, the intention behind the establishment of the Political Parties [Disputes] Tribunal was to create a specialised body for the resolution of inter party and intra party disputes. The creation of the Tribunal was in line with the provisions of Article 159 of the Constitution which provides for the exercise of judicial power by courts and tribunals established under the constitution and for the use of alternative dispute resolution mechanisms. Further, a major concern in the administration of justice in Kenya has been the extent to which the courts have been unable to deal expeditiously with matters before them. A situation in which disputes between members of political parties amongst themselves or with their parties wind up in the Constitutional division of the High Court would clearly be prejudicial to the expeditious disposal of cases. [13] To my mind, the provisions of Section 40 (2) of the Political Parties Act must be interpreted as permitting aggrieved members of a political party to bring their grievance before the Political Parties Tribunal where the political party has neglected or refused to activate the internal party dispute resolution mechanism. The section must be read as contemplating assumption of jurisdiction by the Tribunal where the internal party mechanism has failed to hear and determine a dispute.**[92]

It is important to note that there have been diverging court interpretations pertaining to activating the jurisdiction of the Tribunal *vis-à-vis* a political party's internal dispute resolution mechanisms. In a judgment delivered on

[92]Ibid para 11-13. See also *Republic v Jubilee Party & another Ex parte Wanjiku Muhia & another* [2017] eKLR, HC (Nairobi), Misc Civil Appli No 308 of 2017, para 41.

15 May 2017 in the case of ***Eric Kyalo Mutua v Wiper Democratic Movement, Kenya & another***,[93] Onguto J addressed the issue by placing reliance on **the doctrine of appropriateness** as follows:

> Evidently, in so much as the relatively less adversarial intra party dispute resolution is encouraged, the statute also expressly grants powers to the PPDT to directly handle disputes having their origins in party nominations. There is concurrent jurisdiction and a party may either land before the PPDT or the party's internal dispute resolution mechanism. It consequently, entails a balancing act between the two statutes and the PPDT must be in a position to invoke the doctrine of appropriateness long enshrined in the cases of ***Sim v Robinow* [1892]19 L R 665 and *The Spiliada [1987] AC 460*. S**ee also the case of ***Patrick Musimba v National Land Commission & 4 Others (No 1)* [2016] eKLR** where both ***Sim v Robinow* (*supra*)** and ***The Spiliada* (*supra*)** were cited with approval and followed. Where appropriate consequently the PPDT should entertain the dispute or alternatively determine that the better forum would be the political party's internal dispute resolution mechanism and refer the dispute to the relevant party organ. The PPDT may however not decline jurisdiction or dismiss a complaint simply because a dispute is yet to be filed before the party's dispute resolution organ. The instances may be various but to my mind, I can immediately identify a situation where time is evidently headed beyond a party's grasp. I may also cite a situation where the political party is evidently bent on frustrating a member. Likewise, there may be an instant where the dispute involves a non-member with a member but off a party primary process. The legislature must have had such instances in mind.[94]

[93] HC (Nairobi), Constitutional & Human Rights Div, Election Pet Appeal No 4 of 2017.
[94] Ibid paras 48-50.

On the other hand, in a judgment delivered on 22 May 2017 in the case of ***Rachael Nyamai v Jubilee Party of Kenya & another***,[95] Muchelule J, while citing **section 40 of the Political Parties Act, 2011,** was categorical that:

> It follows that the Tribunal shall only hear an appeal between a political party and its member where the member's grievance or complaint has first been heard and determined by the party's internal dispute resolution mechanism. Where the Constitution or statute has established a dispute resolution mechanism, that mechanism has to be used and exhausted.[96]

In addition, in a judgment delivered on 2 June 2017 in the case of ***David M Mbuthi v Jubilee Party & another***,[97] PPDT held that:

> For instance, it is our interpretation of the law that a party primary dispute can be characterized as a dispute between a member of a political party and a political party or as a dispute of between members of a political party. Meaning, <u>despite being a distinct dispute according to the Act, a party primary dispute ordinarily ought to be referred first to a political party's internal dispute resolution mechanism. To augment this view, we seek recourse from section 13(2A) of the Elections Act, which gives political parties thirty days within which to resolve such disputes.</u> This Tribunal is persuaded to take the view that it is not in vain that the law requires a party primary dispute to be resolved internally by a political party's dispute resolution mechanism.[98]

3.2.5 Is there Concurrent Jurisdiction between IEBC and PPDT?

As stated earlier, the jurisdiction of PPDT is provided for in **section 40 of the Political Parties Act, 2011**. PPDT is empowered to hear and determine

[95] HC (Milimani, Nairobi), Election Pet Appeal No 58 of 2017.
[96] Ibid para 5.
[97] [2017] eKLR, PPDT (Nairobi), Complaint No 305 of 2017 (Hon Mbobu, Atema and Abdi).
[98] Ibid paras 12 and 13.

pre-election disputes, among them being disputes arising out of party nominations; **section 40(1)(fa) of the Political Parties Act, 2011**.[99] On the other hand, IEBC is mandated under **article 88(4)(e)**, **section 4(e) of the IEBC Act, 2011** and **section 74(1) of the Elections Act, 2011** to settle of pre-election disputes, including disputes relating to or arising from nominations, excluding election petitions and post-election disputes. Consequently, both PPDT and IEBC have jurisdiction in the resolution of nomination disputes; **'disputes arising out of party nominations'** and **'disputes relating to or arising from nominations'**, respectively. **Section 2 of the Elections Act, 2011** defines *'nomination'* as *'the submission of the name of a candidate to IEBC in accordance with the Constitution and [the Elections] Act.'*

Nonetheless, it is important to note that, **section 27(a)(ii) of the Political Parties (Amendment) Act, 2022** did amend **section 40(1)(fa) of the Political Parties Act, 2011** by substituting the phrase *'party primaries'* with *'party nominations'*. **Section 2(b) of the amendment Act** also deleted the phrase *'party primary'* from the definition section under **section 2 of the Political Parties Act, 2011**. This change (move from *'party primaries'* to *'party nominations'* under **section 40(1)(fa) of the Political Parties Act, 2011**) may have some interesting effects on the delimitation of roles between PPDT and IEBC as far as the resolution of nomination disputes are concerned.

As an aside though, **regulation 2 of the Elections (General) Regulations, 2012** defines *'party primary'* as *'the process through which a political party elects or selects a candidate for an election but does not include a party list.'*[100] In that case, disputes arising from party primaries excluded disputes arising out of the allocation of party list seats under **article 90 of the Constitution**, which are under the IEBC's mandate by virtue of **article 90(2) of the Constitution**. The allocation of party list seats under **article 90 of the Constitution** aims for proportional representation through the use of party lists submitted to IEBC in respect of the nominative posts under **articles**

[99] See Political Parties (Amendment) Act, 2022, s 27(a)(ii).
[100] Elections (General) Regulations, 2012.

97(1)(c)[101] and **98(1)(b), (c) and (d) of the Constitution**[102] for Members of Parliament, and under **article 177(1)(b) and (c) of the Constitution** for Members of County Assemblies.

On 28 May 2017, **PPDT and IEBC signed a Memorandum of Understanding (MoU) on responsibilities in the resolution of pre-election disputes arising from party primaries and nominations** to delimit the roles of the two EDR mechanisms in the resolution of pre-election disputes. Moreover, the Court of Appeal had occasion to comment on **section 40(1)(fa) of the Political Parties Act, 2011** (which at the time gave PPDT jurisdiction over disputes arising out of '*party primaries'*) in the case of ***Joseph Ibrahim Musyoki v Wiper Democratic Movement-Kenya & another***.[103] The Court of Appeal stated:

> It is significant to note that **Section 40 [1](fa) [of the Political Parties Act, 2011]** was an amendment made by Act No. 21 of 2016 [Political Parties (Amendment) (No.2) Act, 2016] on 21st July 2016 with the object of addressing the challenge of concurrent jurisdiction with other bodies handling electoral disputes. The two institutions therefore have their roles clearly and distinctively cut out. Indeed, this was acknowledged by the PPDT and the High Court.[104]

[101] Concerns the twelve (12) Members of the National Assembly nominated by parliamentary political parties according to their proportion of elected Members of the National Assembly, to represent special interests including the youth, persons with disabilities and workers.
[102] Concerns the sixteen (16) women Members of the Senate nominated by political parties according to their proportion of the forty-seven (47) elected Members of the Senate; two (2) members, being one (1) man and one (1) woman, representing the youth; and two (2) members, being one (1) man and one (1) woman, representing persons with disabilities.
[103] [2017] eKLR, CoA (Nairobi), Civil Appeal No 203 of 2017 (Waki, Musinga & Ouko, JJA).
[104] Ibid para 20.

In the said case, the Court of Appeal found that since the issue therein had transited from *'party primary'* to *'nomination'* then PPDT no longer had jurisdiction as the matter now fell on the IEBC's jurisdiction:

> The sum total of the pleadings and affidavit evidence lead us to the inescapable conclusion that as at the 6th June 2017, and certainly before the PPDT determined the complaint laid before it by Musyoki, the name of Maundu had been submitted to IEBC as the nominee of Wiper. It follows that the process had transited from party primary to nomination as by law defined and that the jurisdiction to challenge the nomination lay with the IEBC.[105]

In view of the amendment made to **section 40(1)(fa) of the Political Parties Act, 2011** by **section 27(a)(ii) of the Political Parties (Amendment) Act, 2022**, it will be interesting to see if the said amendment complicates the roles of PPDT and IEBC in the resolution of nomination disputes.

3.2.6 The Jurisdiction of Courts over Pre-Election Disputes

Courts have inherent jurisdiction to hear and determine pre-election disputes, as well as jurisdiction granted by the Constitution and legislation. The jurisdiction of courts to hear pre-election disputes can be invoked in civil, criminal and judicial review proceedings. The High Court possesses inherent jurisdiction to hear and determine pre-election disputes by dint of **article 165(3)(a) of the Constitution** that confers unlimited original jurisdiction in criminal and civil matters to that Court. More particularly, such pre-election disputes can be framed as a denial, violation or infringement of political rights possessed by every citizen under **article 38 of the Constitution**. In that case, **articles 23(1) and 165(3)(b) of the Constitution** provide the High Court with jurisdiction to determine a question as to whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened. Further, **article 22(1) of the Constitution** grants every person the right to institute court proceedings claiming that such rights have been denied, violated, infringed, or threatened.

[105] Ibid para 29.

Sections 6 and 7 of the Magistrates' Courts Act, 2015[106] embody the civil and criminal jurisdiction of the magistrates' courts.[107] In addition, **article 23(2) of the Constitution**, empowers Parliament to enact legislation to devolve the High Court's original jurisdiction under **article 23(1) of the Constitution** to the Magistrates' Courts. Subject to **article 165(3)(b) of the Constitution**, **section 8 of the Magistrates' Courts Act, 2015** grants magistrates' courts jurisdiction to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights within the parameters of their pecuniary jurisdiction under **section 7(1) of the Magistrates' Courts Act, 2015**.

In such proceedings instituted under **article 23(1) and (2) of the Constitution**, courts have wide discretion to grant appropriate relief by virtue by **article 23(3) of the Constitution**. Reliefs that can be granted by the courts include a declaration of rights; an injunction; a conservatory order; a declaration as to the invalidity of any law that denies, violates, infringes, or threatens rights and fundamental freedoms in the Bill of Rights, in this case political rights under **article 38 of the Constitution**; an order for compensation; and or judicial review orders of certiorari, mandamus or prohibition. Further, **article 258 of the Constitution**, which is coined in similar terms as **article 23 of the Constitution**, allows any person to institute court proceedings regarding contraventions of or threatened contraventions of the Constitution, in this case as pertains to the provisions in chapter seven through to chapter eleven of the Constitution on constitutional issues

[106] Act No 26 of 2015, Laws of Kenya.

[107] The criminal jurisdiction of magistrates' courts is drawn from the Criminal Procedure Code (Cap 75) and any other written law which defines offences and prescribes the applicable penalties, including electoral statutes which provide for election offences. On the other hand, the civil jurisdiction of magistrates' courts is capped under section 7(1) of the Magistrates' Court Act, 2015 as follows: (a) twenty (20) million shillings, where the court is presided over by a chief magistrate (CM); (b) fifteen (15) million shillings, where the court is presided over by a senior principal magistrate (SPM); (c) ten (10) million shillings, where the court is presided over by a principal magistrate (PM); (d) seven (7) million shillings, where the court is presided over by a senior resident magistrate (SRM); or (e) five (5) million shillings, where the court is presided over by a resident magistrate (RM).

regarding the representation of the people and presidential, parliamentary, and county elections.

However, approaching the courts to resolve electoral disputes should be a matter of last resort. The settlement of pre-election disputes is predicated on **the principle of exhaustion of internal and other available administrative mechanisms for electoral dispute resolution** before approaching the courts as a last resort, pre-election or via an election petition filed after the declaration of election results. In ***Francis Gitau Parsimei v The National Alliance Party & 4 others***,[108] the Honourable Justice Majanja of the Constitutional Court stated thus:

> More recently, we have a controlling precedent from the Court of Appeal. In the case of ***Interim Independent Electoral Commission and Another v Paul Waweru Mwangi*** **CA Civil Application No. 130 of 2011 (Unreported),** the Court of Appeal discharged an injunction issued by the High Court restraining the then Commission from conducting of the Kamkunji by-election on account of allegations of the breach of fundamental rights and freedoms during the nomination stage. In my view, this insistence of a specific procedure is not inconsistent with the Bill of Rights; it is recognition that election disputes require special rules for determination. These rules are justifiable in a democratic society and the Constitution itself contemplates that the electoral process is a special process. In light of what I have stated, I hereby discharge the orders issued on 17th August 2012 in **Nairobi Petition No. 356 of 2012** which had the effect of restraining the 1st respondent from forwarding or submitting the 2nd respondent's name to the IEBC for nomination for the Kajiado North Parliamentary election. Similarly, I reject the application in **Nairobi Petition No. 359 of 2012** seeking to restrain the 3rd respondent from presenting the 2nd respondent to the IEBC for nomination as a

[108] [2012] eKLR, Const Pet No 356 of 2012 (Consolidated with Const Pet No 359 of 2012).

> candidate for the Kangema Parliamentary election. It is also my view that **Article 88(4)(e)** and **section 74(1)** of the **Elections Act, 2011** provide for alternative modes of dispute resolution specific to the nomination process. This court cannot entertain nomination disputes where such a process has not been invoked or where it has been demonstrated that the process has failed. It must follow that the two petitions filed are incompetent and are hereby struck out but with no order as to costs.[109]

4 Post-Election Dispute Resolution Mechanisms

The first part of this paper focused on pre-election disputes, which are mostly resolved outside of the Kenyan courts system. This part of the paper shall primarily focus on the post-election disputes that are resolved through the judicial system via election petitions filed in the election courts after the declaration of election results. The timelines and procedure for filing, service, hearing and determination of election petitions and appeals are provided for in the **Constitution**, the **Elections Act, 2011**, **Elections (Parliamentary and County Elections) Petitions Rules, 2017**, as applicable to parliamentary and county elections, the **Court of Appeal (Election Petition) Rules, 2017**, and the **Supreme Court (Presidential Election Petition) Rules, 2017**. A summary of the applicable timelines and procedure is considered when dealing with the management of team dynamics in election petitions later on.

4.1.3 Presentation of Election Petitions

Election petitions are instituted subsequent to the declaration of election results by IEBC's returning officers.[110] The Elections Act, 2011 has set out provisions concerning the presentation of election petitions in court. Per **section 76 of the Elections Act, 2011**, an election petition can be instituted to:

[109] Ibid paras 7-12.
[110] Elections Act, 2011, s 39.

(i) question the validity of an election;[111]

(ii) seek a declaration that a seat in Parliament or a county assembly has not become vacant;[112]

(iii) seek a declaration that a seat in Parliament or a county assembly has become vacant;[113]

(iv) question a return or an election on the ground of a corrupt practice(s);[114]

(v) question a return or an election on an allegation of an illegal practice(s);[115] or

(vi) question a return or an election upon an allegation of an election offence.[116]

One, per **section 76(1)(a) of the Elections Act, 2011,** an election petition to question the validity of an election is to be **filed within twenty-eight (28)** days after the date of declaration of the results of the election and **served within fifteen (15) days** of presentation of the petition. It is worth noting that the constitutionality of **section 76(1)(a) of the Elections Act, 2011** was considered in the case of ***Hassan Ali Joho & Another v Suleiman Said Shahbal & 2 Others***,[117] and the Supreme Court stated:

> Insofar as the Constitution (Article 87(2)) provides that: "Petitions concerning an election other than a presidential election, shall be filed within twenty-eight days after the declaration of the election results…," while the Elections Act, 2011 (Section 76 (1)) provides that: "A petition – a. to question the validity of an election shall be filed within twenty-eight days after the date of publication of the results of the election in

[111] Ibid s 76(1)(a).
[112] Ibid s 76(1)(b).
[113] Ibid s 76(1)(c).
[114] Ibid s 76(2).
[115] Ibid s 76(3).
[116] Ibid s 76(4).
[117] [2014] eKLR, SCoK Pet No 10 of 2013.

> the Gazette…," and as it is clear that expedition in the disposal of electoral disputes is a fundamental principle under the Constitution, we hold the said provision of the Elections Act to be inconsistent with the terms of the Constitution.[118]

Two, an election petition seeking a declaration that a seat in Parliament or a county assembly has not become vacant is to be presented within twenty-eight (28) days after the date of publication of the notification of the vacancy by the relevant Speaker.[119] Three, an election petition seeking a declaration that a seat in Parliament or a county assembly has become vacant may be presented at any time.[120]

An election petition questioning a return or an election on the ground of a corrupt practice(s) must specifically allege a payment of money or other act which has been made or done since the date aforesaid by the person whose election is questioned or by an agent of that person or with the privity of that person or his agent may, so far as respects the corrupt practice. Such a petition is to be filed within twenty-eight (28) days after the publication of the election results in the *Gazette*.[121]

An election petition questioning a return or an election upon an allegation of an illegal practice must allege a payment of money or other act which has been made or done since the date aforesaid by the person whose election is questioned, or by an agent of that person, or with the privity of that person or his election agent in pursuance or in furtherance of the illegal practice alleged in the petition. Such a petition is to be filed within twenty-eighty (28) days after the publication of the election results in the *Gazette*.[122]

An election petition filed in time may be amended with the leave of the election court for the purpose of questioning a return or an election upon an allegation of an election offence, within the time within which the petition

[118] Ibid para 101.
[119] Ibid s 76(1)(b).
[120] Ibid s 76(1)(c).
[121] Ibid s 76(2).
[122] Ibid s 76(3).

questioning the return or the election upon that ground may be presented.[123] Where an election petition has already been presented on other grounds, **a supplemental petition** may be presented in respect of a petition questioning a return or an election under **section 76(2) and (3)**, that is, on the ground of a corrupt practice(s) or on an allegation of an illegal practice(s).

4.1.4 Security for Costs

Under **section 78(1) of the Elections Act, 2011**, a petitioner is required to deposit security for the payment of costs that may become payable by the petitioner **not more than ten (10) days after the presentation of an election petition**. A deposit of:

i) KES 1M, in the case of a petition against a presidential candidate;
ii) KES 500,000, in the case of a petition against a member of Parliament of a county governor; and
iii) KES 100,000, in the case of a petition against a member of a county assembly.[124]

It is important to note that where a petitioner does not deposit security as required, or if an objection is allowed and not removed, no further proceedings shall be heard on the election petition and the respondent may apply to the election court for an order to dismiss the petition and for the payment of the respondent's costs.[125]

4.1.5 Procedure of the Election Court on Receipt of Petition

Upon receipt of an election petition, an election court will peruse the petition and may reject the petition summarily if it considers that no sufficient ground for granting the relief claimed is disclosed in the petition, or may fix a date for the trial of the petition.[126]

[123] Ibid s 76(4).
[124] Ibid s 78(2).
[125] Ibid s 78.
[126] Ibid s79

4.1.6 Powers of the Election Court

According to **section 80(1) of the Elections Act, 2011**, an election court may, in the exercise of its jurisdiction:

(a) summon and swear in witnesses in the same manner or, as nearly as circumstances admit, as in a trial by a court in the exercise of its civil jurisdiction and impose the same penalties for the giving of false evidence.
(b) compel the attendance of any person as a witness who appears to the court to have been concerned in the election or in the circumstances of the vacancy or alleged vacancy.
(c) examine a witness who is compelled to attend or any other person who has not been called as a witness in court, and examined by a party to the petition and after examination the witness may be cross examined by or on behalf of the petitioner and respondent or either of them.
(d) decide all matters that come before it without undue regard to technicalities.[127]

A person who refuses to obey an order to attend court commits the offence of contempt of court.[128] In any case, in the proceedings of an election petition, a voter who voted in the elections will not be required to state whom they voted for.[129] Moreover, interlocutory matters in connection with a petition challenging results of presidential, parliamentary or county elections are to be heard and determined by the election court.[130] Lastly, an election court may by order direct IEBC to issue a certificate of election to a President, a member of Parliament or a member of a county assembly if upon recount of the ballots cast, the winner is apparent and that winner is found not to have committed an election offence.[131]

[127] Ibid s 80(1).
[128] Ibid s 80(2).
[129] Ibid s 81.
[130] Ibid s 80(3).
[131] Ibid s 80(4).

4.1.7 Appeals to the Court of Appeal

An appeal from the High Court in an election petition concerning membership of the National Assembly, Senate or the office of county governor shall lie to the Court of Appeal on matters of law only.[132] The appeal is to be filed within thirty (30) days of the decision of the High Court, and will be heard and determined within six (6) months of the filing of the appeal. The appeal shall act as a stay of the certificate of the election court certifying the results of an election until the appeal is heard and determined.[133] Further procedure on such appeals is provided for in the **Court of Appeal (Election Petition) Rules, 2017**.[134]

4.1.8 Certificate of Court as to Validity of an Election

An election court shall, at the conclusion of the hearing of an election petition, determine the validity of any question raised in the petition, and shall certify its determination to IEBC and notify the relevant Speaker.[135] The election court may uphold or nullify an election upon determination of the election petition.

4.2 Case Studies in Electoral Dispute Resolution in Courts

4.2.3 Moses Mwicigi & 14 others v Independent Electoral and Boundaries Commission & 5 others[136]

4.2.3.1 Background

The Supreme Court was confronted with **the issue of jurisdiction of the courts as pertains to disputes contesting the validity of a political party list submitted to IEBC under article 90 of the constitution;** which is the proper forum and in which way is the court to be approached—through an

[132] Ibid s 85A (1).
[133] Ibid s 85A (2).
[134] Legal Notice No 114 of 2017.
[135] Elections Act, s 86
[136] [2016] eKLR, SCoK Pet No 1 of 2015 (Judgment delivered on 26 April 2016 by Mutunga; CJ & P, Ibrahim, Ojwang, Wanjala & Njoki, SCJJ) <http://kenyalaw.org/caselaw/cases/view/123322/>.

election petition or through a constitutional petition or judicial review proceedings?

This matter evolved through the entire hierarchy of Superior Courts, from the High Court to the Supreme Court. The genesis of the matter is a dispute involving the nominations of The National Alliance Party (TNA)'s, the 2nd respondent, party-list representatives for gender top-up, youth, and marginalized categories for the Nyandarua County Assembly.[137] Among the key questions in the case was on **the mandate of the election court as regards matters arising from nomination of representatives on the basis of political party lists under article 90 of the Constitution**.

The 3rd, 5th and 6th respondents filed a number of **complaints** against the appellants before the **IEBC Dispute Resolution Committee (DRC)**. On 4 May 2013, IEBC's DRC dismissed the first set of complaints, on the grounds *inter alia* that there was insufficient evidence; that the complaints lacked merit; and that those dissatisfied should file formal suits for the recovery of their money, or move the Political Parties Dispute Tribunal (PPDT) as appropriate. Subsequently on 7 June 2013, IEBC's DRC dismissed the second set of complaints, on the ground that the matter was *res judicata* as it had been previously adjudicated upon.

On 9 May 2013, the 5th and 6th respondents filed ***Esther Njogu & Another v Independent Electoral Commission,*** **Constitutional Petition No 238 of 2013**, at the **High Court** on grounds that: the decision of DRC was unconstitutional; and **violated the Bill of rights** and **articles 90, 98, 174 and 177 of the Constitution** as it purported to exclude and discriminate against Ndaragwa, Ol' Kalau and Ol'Jororok Constituencies.

On 21 June 2013, the 3rd respondent instituted **judicial review proceedings** by filing ***Republic v the Independent Electoral Boundaries Commission & 17 Others Ex-parte Lydia Nyaguthi Githendu,*** Nairobi **High Court Miscellaneous Civil Application (Judicial Review) No 218 of 2013**, seeking an order of certiorari to quash the decision of the IEBC's DRC made

[137] Ibid para 69.

on 7 June 2013 on grounds that it did not conform to the provisions of **articles 90(2)(b) and 177(1)(b) and (c) of the Constitution**.

The High Court declined jurisdiction and dismissed the matters, on grounds that the issues raised were party matters that rest entirely with the political party and its members, and that no error had been disclosed to impugn the Committee's decision.[138] Following the High Court decisions, IEBC on 17 July 2013 through *Gazette Notice* No 9794 dated the same day, designated the appellants as TNA members of Nyandarua County Assembly.

The 3rd, 5th and 6th respondents appealed to the **Court of Appeal (*Lydia Nyaguthii Githendu v the Independent Electoral Boundaries Commission & Others*, Civil Appeal No 224 of 2013,** and ***Esther Njogu & Another v the Independent Electoral Boundaries Commission & Others*, Civil Appeal No 238 of 2013)**. The Court of Appeal heard the two appeals together as matters founded upon the same set of facts and a common legal position, that is, the constitutionality, legality and regularity of the two Nyandarua County Assembly TNA party lists, published by IEBC on 15 and 16 May 2013. The Court of Appeal delivered its judgment on the 23 January 2015.[139] The Court of Appeal considered whether it was properly seized of the matter, and whether the High Court had jurisdiction to entertain the matter in issue and found that both it and the High Court had jurisdiction to entertain the matter. The Supreme Court reported on the same as follows:

> The Court [of Appeal] held that it did have jurisdiction, observing that there is a constitutional mandate donated to the Court, to hear all appeals emanating from the High Court. It then held that the matters which had come before the High Court, touched on the

[138] See *Esther Njogu & 2 others v Independent Electoral and Boundaries Commission & another* [2013] eKLR, HC (Milimani, Const & Human Rights Div), Const Pet No 238 of 2013 (Ngugi, Majanja & Korir JJ) <http://kenyalaw.org/caselaw/cases/view/83891>.

[139] *Lydia Nyaguthii Githendu v The Independent Electoral and Boundaries Commission (IEBC) & 17 others* [2015] eKLR, CoA (Nairobi), Civil Appeal No 224 of 2013 (consolidated with Civil Appeal No 238 of 2013) (Nambuye, Warsame & Murgor, JJA) <http://kenyalaw.org/caselaw/cases/view/105289>.

> constitutionality and the legality of the nomination list submitted to the Commission, pursuant to the relevant provisions of the Constitution and the Elections Act, by TNA as a party, and with respect to Nyandarua County Assembly. The Appellate Court held that the High Court had the mandate to hear the matters, but had erroneously declined jurisdiction.[140]

The Court of Appeal allowed the two appeals and granted the prayers requested in the constitutional petition and the judicial review application filed before the High Court.[141] The respondents being aggrieved by the finding of the Court of Appeal, lodged an appeal at the Supreme Court.

4.2.3.2 Determination

The Court found that from legislation it is clear that political parties have a responsibility to prepare and submit to IEBC, a party list of all persons who would stand elected if the party were entitled to all the seats; that, '**Sections 34(4), 35 and 36 of the Elections Act, 2011** and **regulation 54 of the Elections (General) Regulations, 2012** bear the phraseology, *"political party submitting"* or a *"party list submitted by the political party".*'[142] The law places upon the IEBC the duty to ensure that the party lists submitted comply with the relevant provisions of the law. The Constitution, by **article 88(4)(e) of the Constitution**, mandates IEBC to intervene and settle disputes relating to, or arising from nominations. However, nowhere does the law grant powers to IEBC to adjudicate upon the nomination processes of a political party: such a role has been left entirely to the political parties.[143] The IEBC only ensures that the party list, as tendered, complies with the relevant laws and regulations.[144]

The question then becomes; At what point in time does the Court become clothed with jurisdiction to determine disputes relating to the nomination of members of a County Assembly by virtue of **article 177(2)(b) and (c) of the**

[140] SCoK Pet No 1 of 2015, para 21.
[141] Ibid paras 22 and 23.
[142] Ibid para 92. See article 90(2)(a) of the Constitution of Kenya, 2010.
[143] SCoK Pet No 1 of 2015, para 93.
[144] Ibid para 94.

Constitution? Is it after the issuance of *Gazette* Notice by IEBC, or at the close of elections when the nomination process begins?[145]

The Supreme Court found that **the publication of the *Gazette* Notice marks the end of the mandate of IEBC, regarding the nomination of party representatives, and shifts any consequential dispute to the election courts. The *Gazette* Notice also serves to notify the public of those who have been *'elected'* to serve as nominated members of a County Assembly**.[146] In doing so, the Supreme Court drew a comparison between nominations under **article 90 of the Constitution** and election into political office by registered voters, and stated as follows:

> **The *Gazette Notice* in this case, signifies the completion of the "election through nomination", and finalizes the process of constituting the Assembly in question. On the other hand, an "election by registered voters", as was held in the *Joho Case,* is in principle, completed by the issuance of Form 38, which terminates the returning officer's mandate, *and shifts any issue as to the validity of results from the IEBC to the Election Court.* [147]**

Secondly there was an argument by counsel for the 3rd, 5th and 6th respondents, that what was before the Court of Appeal (and the High Court) was not *an 'election petition'* but a constitutional petition seeking to prevent the violation of the rights of the respondents. Counsel urged the Court to **distinguish between an *'election petition'* and a contestation over the *'validity of a political-party list'***.[148] On this question, the Court found that the broader spectacle is compelling: the electoral-process is dominant; and it allows no separation between **article 90 of the Constitution** (which deals with party-list seats) and **article 177 of the Constitution** (which deals with membership of county assemblies). This was a petition contesting the

[145] Ibid para 101.
[146] Ibid para 107.
[147] Ibid para 106.
[148] Ibid para 108.

nomination of the appellants, nomination which is an integral part of the electoral process, in the terms of the Constitution and electoral law.

It follows that only an election court had the powers to disturb the *status quo*. Any aggrieved party would have to initiate the process of ventilating grievances by way of an election petition, in accordance with **section 75 of the Elections Act, 2011**. The High Court had declined jurisdiction on the perception that this dispute ought to have originated at the PPDT but the Court of Appeal assumed jurisdiction and granted the orders sought at the High Court.[149] However, **the orders of the Court of Appeal had the effect of annulling the appointment of the appellants, whose names had been gazetted, and who had taken the oath of office as the TNA-nominated members of Nyandarua County Assembly, which was contrary to article 87 of the Constitution and section 85A of the Elections Act, 2011 because it had not been moved as an election court.[150] In essence, both an election by registered voters and an election by nomination under article 90 of the Constitution can only be challenged through an election petition and not any other mechanism.**

The Supreme Court importantly stated that to allow an electoral dispute to be transmuted into a petition for the vindication of fundamental rights under article 165(3) of the Constitution, or through judicial review proceedings carries the risk of opening up a parallel electoral dispute-resolution regime. Such an event would serve not only to complicate, but ultimately, to defeat the *sui generis* character of electoral dispute-resolution mechanisms, and notwithstanding the vital role of electoral dispute-settlement in the progressive governance set-up of the current Constitution.[151] Further, the Supreme expressed the view that, **'Our electoral dispute-resolution regime has a continuum of institutions that require strengthening, through the judicial system: namely, the political parties; the Political Parties Disputes Tribunal; and the IEBC. These**

[149] Ibid para 110
[150] Ibid paras 111-118.
[151] Ibid para 119

have to comply with the Constitution, and the electoral laws and regulations.'[152]

The Supreme Court thus issued orders that set aside the judgment and orders of the Court of Appeal of 23 January 2015 and allowed the petition of appeal.[153]

4.2.4 Hassan Ali Joho & Another v Suleiman Said Shahbal & 2 Others[154]

This case allowed the Supreme Court to pronounce itself **on the issue of delimitation of electoral jurisdiction between IEBC and the election courts**, a highly contested issue that had brought a multiplicity of suits. In a judgment delivered on 4 February 2014, the Court stated as follows:

> The jurisdiction to handle disputes relating to the electoral process shifts from the Commission to the Judiciary upon the execution of the required mandate by the returning officer. Once the returning officer makes a decision regarding the validity of a ballot or a vote, this decision becomes final, and only challengeable in an election petition. The mandate of the returning officer, according to **Regulation 83(3)**, terminates upon the return of names of the persons-elected to the Commission. The issuance of the certificate in Form 38 to the persons-elected indicates the termination of the returning officer's mandate, thus shifting any issue as to validity, to the election Court. Based on the principle of efficiency and expediency, therefore, the time within which a party can challenge the outcome of the election starts to run upon this final discharge of duty by the returning officer. After these results have been delivered to the Commission, the *Commission is mandated to publish a notice in the Gazette,*

[152] Ibid para 121.
[153] Ibid para 123.
[154] [2014] eKLR, SCoK, Pet No 10 of 2013 (Rawal, DCJ, Tunoi, Ibrahim, Ojwang, Ndungu, SCJJ) <http://kenyalaw.org/caselaw/cases/view/93989/>.

> which may form part of a composite notice, showing the names of the person or persons elected **[Regulation 87 (4)(b)]**. (…) In our considered view the **Gazette Notice** and/or publication of election results, is simply the *affirmation of the election results declared by the returning officer.*[155]

The Supreme Court also consider the following issues:

i) What is the meaning of 'declaration of election results?'
ii) Who declares the election results?
iii) Which instrument, if any, is used to declare election results?
iv) What is the import of the Gazette notice, and what is the role of the Chairperson of the Commission in declaring election results?[156]

On the issue regarding **which instrument is used to declare election results**,[157] the Supreme Court held that **section 76(1)(a) of the Elections Act, 2011** is inconsistent with **article 87(2) of the Constitution** and, to that extent, is a nullity.[158] According to the Court, the purpose of the *Gazette Notice* in **section 76(1)(a) of the Elections Act, 2011** cannot be termed as the instrument of declaration of the election results.[159] *Gazettement* is one of the mechanisms through which the State publishes information to the public and the public nature of elections demands that the outcome of the polling is shared with the public. At **paragraph 101 of the judgment**, the Supreme Court analysed the issue on the constitutionality of **section 76(1)(a) of the Elections Act, 2011** as follows:

> In so far as the Constitution (Article 87(2)) provides that: **"Petitions concerning an election other than a presidential election, shall be filed within twenty-eight days after the declaration of the election results…,"** while the Elections

[155] SCoK Pet No 10 of 2013, paras 65 and 66.
[156] Ibid para 67.
[157] Ibid paras 94-101.
[158] Ibid para 103.
[159] Ibid para 99.

> Act, 2011 (Section 76 (1)) provides that: **"A petition –** a. **to question the validity of an election shall be filed within twenty-eight days after the date of publication of the results of the election in the Gazette…,"** and as it is clear that expedition in the disposal of electoral disputes is a fundamental principle under the Constitution, we hold the said provision of the Elections Act to be inconsistent with the terms of the Constitution. By Article 2(4) of the Constitution, **"Any law…that is inconsistent with this Constitution is void to the extent of the inconsistency, any act or omission of the Constitution is invalid".**

5 Litigating Election Petitions

Election petitions are instituted subsequent to the declaration of election results by IEBC and can arise in respect of **presidential, parliamentary and county elections and include by-elections**.[160] Presidential elections concern elections to the office of President. **Articles 140, 163(3)(a), and 165(5)(a) of the Constitution of Kenya, 2010 (the Constitution)** give the Supreme Court exclusive original and final jurisdiction to hear and determine disputes relating to presidential elections. [161] Parliamentary elections concern elections of members of the National Assembly or the Senate, which together comprise Members of the Parliament of Kenya. **Article 105(1) of the Constitution** gives the High Court jurisdiction to hear and determine any question as to whether a person has been validly elected as a Member of Parliament, or whether the seat of a Member of Parliament has become vacant.[162]

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[160] See definition of *'election'* in section 2 of the Elections Act, 2011, Act No 21 of 2011, Laws of Kenya.

[161] Articles 136-140 of the Constitution of Kenya, 2010 concern election of the president; qualifications and disqualifications for election as president; procedure at presidential election; procedure to be followed in case of death of a president-elect after being declared elected as president, but before assuming office; and questions as to validity of presidential election.

[162] Articles 97-105 of the Constitution of Kenya, 2010 concern elections to and membership of the Parliament of Kenya.

County elections concern elections of county governors and members of county assemblies.[163] **Section 75(1) of the Elections Act, 2011** gives the High Court within the county or nearest to the affected county, jurisdiction in respect of a question as to the validity of an election of a county governor. On the other hand, **section 75(1A) of the Elections Act, 2011** gives Resident Magistrates Courts to be designated as such by the Chief Justice, jurisdiction in respect of a question as to the validity of the election of a member of a county assembly (MCA).

Election petitions are heard and determined by an election court.[164] **Section 2 of the Elections Act, 2011** defines an *'election court'* to mean *'the Supreme Court in exercise of the jurisdiction conferred upon it by Article 163 (3) (a) or the High Court in the exercise of the jurisdiction conferred upon it by Article 165 (3) (a) of the Constitution and the Resident Magistrate's Court designated by the Chief Justice in accordance with section 75 of [the Elections] Act.'*

Litigating election petitions can bring together more than one advocate or firm to represent a party to the dispute (litigation team). This part of the paper considers the dynamics of litigating election petitions in teams, in terms of the timelines and procedures in respect of election petitions that necessitate the need to manage litigation team dynamics towards an ultimate desirable and expeditious resolution of an election petition.

5.1 Team Dynamics in Litigating Election Petitions

The special nature of election petitions as a component of the larger EDR mechanisms makes them complex, urgent, and demanding of thought and skill. As a result, a one-man job may not be able to pull through, thereby necessitating the need for a litigation team for the proper execution of an election petition. There are stringent timelines to be met. There are special

[163] Articles 177 and 193 of the Constitution of Kenya, 2010 concern the membership of county assembly and qualifications for election as member of county assembly; Article 180 of the Constitution concerns election of county governor and deputy county governor.
[164] See rule 6 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017.

laws and rules of procedure applicable in the context of election petitions. There is need to strategize quickly to best represent your client and outsmart the opponent. There is urgent need for research and analysis of voluminous documents, including documents and materials to be relied on as evidence, and the opponent's pleadings. There is need to draft proper and stellar pleadings to articulate your client's case with accuracy, correctness and completeness. There is limited time to present the best and winning argument before the election court covering all the vital aspects of your client's case.

These multiple components involved in the litigation of election petitions necessitates that a litigation team be on top of their game. Rebecca Green notes the information imbalance that may arise in post-election dispute resolution based on the expertise and preparednesss of a litigation team in comparison to the opponent; an imbalance which may have devastating effects for both the candidate (the client) and the voters:

> One campaign might hire a sophisticated legal team that understands how various process decisions affect its candidate. If the other campaign has not hired a sophisticated election attorney (or if the attorney hired proves to be less skillful than opposing counsel) this imbalance might prove a great disadvantage. This disadvantage is not just problematic for the candidate, but also for the voters who selected that candidate. In a recount scenario, poor or uninformed lawyering can result in the disenfranchisement of voters. (…) [S]tate election administrators and judges also vary widely in process sophistication.[165]

Generally, and as concerns election petitions, litigating in teams is wrought with both advantages and disadvantages. Election petitions in particular tend to draw large litigation teams. The outstanding advantage of such large litigation teams seems to be the ability to divide up the various issues that

[165] Rebecca Green, 'Mediation and Post-Election Litigation: A Way Forward,' (2012), 27(2) *Ohio State Journal on Dispute Resolutionp* 325-379, 349 <https://core.ac.uk/download/pdf/159589369.pdf>.

are up for determination amongst the advocates or firms based on their skill sets and expertise. Dividing up the issues among the advocates or firms constituting a litigation team is actually necessary to allow an advocate or team of advocates to pay special and particular attention to one or two issues, keeping in mind the tight timelines for the hearing and determination of election petitions. The disposal of election petitions is done on the foundation of expeditious disposal of matters and in tandem with **article 87(1) of the Constitution**.

Litigation teams handling election petitions, like in other matters, must adhere to professional rules and guidelines for advocates under the **Advocates Act (Cap 16)** and the attendant practice rules and regulations in their interactions with one another and in assisting the court to further the overriding objective. Professional etiquette and civility in personal interactions and correspondences is necessary, especially timely service and response to pleadings. In any case, litigating election petitions requires the sacrifice of time in terms of working long hours into the night to be able to file stellar pleadings within the stipulated timelines.

5.2 Timelines and Procedures in respect of Election Petitions

Section 85 of the Elections Act, 2011 is categorical that an election petition is to be heard and determined within the period specified in the Constitution. The timelines and procedure in respect of election petitions are provided for in the **Constitution**, the **Elections Act, 2011**, **Elections (Parliamentary and County Elections) Petitions Rules, 2017**, as applicable to parliamentary and county elections,[166] the **Court of Appeal (Election Petition) Rules, 2017**, and the **Supreme Court (Presidential Election Petition) Rules, 2017**. **Rule 4(1) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017** is categorical that the objective of

[166] As provided in **rule 3 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017**, the rules only apply in respect of election of members of Parliament, county governors, and members of county assemblies. **Rule 2** defines an *"election court"* to mean *"the High Court in the exercise of the jurisdiction conferred upon it by Article 165 (3)(a) of the Constitution or the Resident Magistrate's Court designated by the Chief Justice in accordance with section 75 of the [Elections] Act."*

the Rules is to **facilitate the just, expeditious, proportionate, and affordable resolution of election petitions**, in this case, parliamentary and county elections.

Rule 8 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017 provides for the form and content of a parliamentary or county election petition. The election petition, which is supported by an affidavit sworn by the Petitioner,[167] is drafted using **Form 1 in the First Schedule of the Rules**. The election petition is divided into paragraphs confined to a distinct subject and numbered consecutively, and will state:

(a) the name and address of the petitioner;

(b) the date when the election in dispute was conducted;

(c) the results of the election, if any, and however declared;

(d) the date of the declaration of the results of the election;

(e) the grounds on which the petition is presented;

(f) the name and address of the advocate, if any, for the petitioner which shall be the address for service; and

(g) the relief sought (such as a declaration on whether or not the candidate whose election is questioned was validly elected; a declaration of which candidate was validly elected; an order as to whether a fresh election should be held; scrutiny and recounting of the ballots cast at the election in dispute; payment of costs; or a determination as to whether or not electoral malpractice of a criminal nature may have occurred.)

IEBC is a Respondent in every election petition.[168] A response to a parliamentary or county election is filed within seven (7) days of service of

[167] See Ibid rules 8(4)(b) and 12.
[168] Ibid rule 9.

the petition on the Respondents and is drafted as in **Form 4 in the First Schedule to the Rules**.[169]

The timelines and procedures in respect of election petitions can be summarised as follows:

	Presidential Elections	Parliamentary Elections	County Elections: County Governor	County Elections: MCA
When and where to file the petition	**Article 140(1) of the Constitution** – file the petition in the **Supreme Court** within **seven (7) days** after the date of the declaration of the results of the presidential election; and before 1400 hrs if filed on the last day available for filing (**Rule 7(3) of the Supreme Court (Presidential Election Petition) Rules, 2017**). – See also **articles 163(3)(a) and 165(5)(a) of the Constitution.**	– **Article 87(2) of the Constitution** and **sections 76(1) and 77(1) of the Elections Act, 2011** – file the petition within **twenty-eight (28) days** after the declaration of the election results by IEBC. – **Article 105(1) of the Constitution** – the petition is filed in the **High Court**.	**Article 87(2) of the Constitution** and **sections 76(1) and 77(1) of the Elections Act, 2011** – file the Petition within **twenty-eight (28) days** after the declaration of the election results by IEBC. – **Section 75(1) of the Elections Act, 2011** – the petition is filed in the **High Court** within the county or nearest to the county.	**Article 87(2) of the Constitution** and **sections 76(1) and 77(1) of the Elections Act, 2011** – file the petition **within twenty-eight (28) days** after the declaration of the election results by IEBC. – **Section 75(1A) of the Elections Act, 2011** – the petition is filed in the Resident Magistrate's Court designated by the Chief Justice.
When Petitione	– **Section 78(1) of the Elections Act,**	– **Section 78(1) of the Elections Act, 2011** –	– **Section 78(1) of the Elections Act,**	– **Section 78(1) of the Elections Act, 2011** – within **ten**

[169] Ibid rule 10 and 11 on service of the election petition on the Respondent and response to the petition, respectively.

r is to deposit security for costs	**2011** – within **ten (10)** days after the presentation of the presidential election petition. **– Section 78(2)(a) of the Elections Act, 2011** – deposit **KES 1 Million** in respect of a presidential election petition. **– Section 78(3) of the Elections Act, 2011** – the Respondent may apply for dismissal of the petition with costs if the Petitioner fails to deposit security as required. **– Section 84 of the Elections Act, 2011** – an election court shall award the costs of and incidental to a petition, which costs shall follow the cause.	within **ten (10)** days after the presentation of the parliamentary election petition. **– Section 78(2)(b) of the Elections Act, 2011** – deposit **KES 500,000/=** in respect of a parliamentary election petition. **– Section 78(3) of the Elections Act, 2011** – the Respondent may apply for dismissal of the petition with costs if the Petitioner fails to deposit security as required. **– Section 84 of the Elections Act, 2011** – an election court shall award the costs of and incidental to a petition, which costs shall follow the cause.	**2011** – within **ten (10)** days after the presentation of the gubernatorial election petition. **– Section 78(2)(b) of the Elections Act, 2011** – deposit **KES 500,000/=** in respect of a gubernatorial election petition. **– Section 78(3) of the Elections Act, 2011** – the Respondent may apply for dismissal of the petition with costs if the Petitioner fails to deposit security as required. **– Section 84 of the Elections Act, 2011** – an election court shall award the costs of and incidental to a petition, which costs shall follow the cause.	**(10)** days after the presentation of the MCA election petition. **– Section 78(2)(c) of the Elections Act, 2011** – deposit **KES 100,000/=** in respect of a MCA election petition. **– Section 78(3) of the Elections Act, 2011** – the Respondent may apply for dismissal of the petition with costs if the Petitioner fails to deposit security as required. **– Section 84 of the Elections Act, 2011** – an election court shall award the costs of and incidental to a petition, which costs shall follow the cause.
When and how to serve the petition	**Article 87(3) of the Constitution** –the petition may be served directly or by advertisement in a newspaper with national circulation. – **Served within 24 hours of filing** the petition and **served**	**– Article 87(3) of the Constitution** and **section 77(2) of the Elections Act, 2011** – the petition may be served personally upon a Respondent or by advertisement in a	**– Article 87(3) of the Constitution** and **section 77(2) of the Elections Act, 2011** – the petition may be served personally upon a Respondent or by advertisement in a newspaper with	**– Article 87(3) of the Constitution** and **section 77(2) of the Elections Act, 2011** – the petition may be served personally upon a Respondent or by advertisement in a newspaper with

	through electronic means within 6 hours of filing the petition – **Rule 10 of the Supreme Court (Presidential Election Petition) Rules, 2017)**.	newspaper with national circulation.[170] **– Section 76(1)(a) of the Elections Act, 2011** – a petition to question the validity of an election shall be served within **fifteen (15) days** of presentation.[171]	national circulation. **– Section 76(1)(a) of the Elections Act, 2011** – a petition to question the validity of an election shall be served within **fifteen (15) days** of presentation.[172]	national circulation. **– Section 76(1)(a) of the Elections Act, 2011** – a petition to question the validity of an election shall be served within **fifteen (15) days** of presentation.[173]
When to respond to the petition	– Respondents, usually the persons declared as President-elect and deputy President-elect, IEBC, and the Chairperson of IEBC as the returning officer for presidential elections,[174] file a **response to the petition (in Form B in the Second**	– Respondents, usually the person whose election is challenged, the returning officer, and IEBC,[175] file a response to the election petition within **seven (7) days** of service of the petition and serve the response within **seven (7) days** of filing.[176]	– Respondents, usually the person whose election is challenged, the returning officer, and IEBC,[177] file a response to the election petition within **seven (7) days** of service of the petition and serve the response within **seven (7) days** of filing.[178]	– Respondents, usually the person whose election is challenged, the returning officer, and IEBC,[179] file a response to the election petition within **seven (7) days** of service of the petition and serve the response within **seven (7) days** of filing.[180]

[170] Rule 2 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017 defines *"direct service"* as *"personal service or service on a duly authorized agent."*
[171] See Ibid rule 10.
[172] Ibid.
[173] Ibid.
[174] See e.g., *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others* [2017] eKLR, Supreme Court of Kenya, Presidential Election Pet No 1 of 2017.
[175] Definition of *"respondent"* in rule 2 of the of the Elections (Parliamentary and County Elections) Petitions Rules, 2017.
[176] Ibid rule 11.
[177] Ibid rule 2.
[178] Ibid rule 11.
[179] Ibid rule 2.
[180] Ibid rule 11.

	Schedule plus replying affidavit) **within 4 days of service of the petition** – **Rule 11 of the Supreme Court (Presidential Election Petition) Rules, 2017)**; or file **notice of intention not to oppose the petition** (**in Form C in the Second Schedule) within three (3) days of service of the petition and serve on the petitioner.**			
Procedure of the Court upon receipt of the petition	**– Section 79 of the Elections Act, 2011** – upon receipt of a petition, an election court will peruse the petition and: (a) if it considers that no sufficient ground for granting the relief claimed is disclosed therein may reject the petition summarily; or (b) fix a date for the trial of the petition.	– **Section 79 of the Elections Act, 2011** – upon receipt of a petition, an election court will peruse the petition and: (a) if it considers that no sufficient ground for granting the relief claimed is disclosed therein may reject the petition summarily; or (b) fix a date for the trial of the petition.	**– Section 79 of the Elections Act, 2011** – upon receipt of a petition, an election court will peruse the petition and: (a) if it considers that no sufficient ground for granting the relief claimed is disclosed therein may reject the petition summarily; or (b) fix a date for the trial of the petition.	**– Section 79 of the Elections Act, 2011** – upon receipt of a petition, an election court will peruse the petition and: (a) if it considers that no sufficient ground for granting the relief claimed is disclosed therein may reject the petition summarily; or (b) fix a date for the trial of the petition.
How long the court has to	**– Article 140(2) of the Constitution** – within **fourteen (14) days** after the	**– Article 105(2) of the Constitution –** the High Court is to hear and determine a	**Section 75(2) of the Elections Act, 2011 – t**he High Court is to hear	**Section 75 of the Elections Act, 2011** does not specify the

determine the petition	filing of a presidential election petition, the Supreme Court shall hear and determine the petition and its decision shall be final. See also **Rule 23 of the Supreme Court (Presidential Election Petition) Rules, 2017).** **– Section 79 of the Elections Act, 2011** – interlocutory matters in connection with a petition challenging results of presidential elections shall be heard and determined by the election court.	parliamentary election petition within **six (6) months** of the date of lodging the petition. **– Section 79 of the Elections Act, 2011** – interlocutory matters in connection with a petition challenging results of parliamentary elections shall be heard and determined by the election court.	and determine a gubernatorial election petition within **six (6) months** of the date of lodging the petition. **– Section 79 of the Elections Act, 2011** – interlocutory matters in connection with a petition challenging results of gubernatorial elections shall be heard and determined by the election court.	timeline for the hearing and determination of a MCA election petition, which is heard by Resident Magistrate's Court designated by the Chief Justice. **– Section 79 of the Elections Act, 2011** – interlocutory matters in connection with a petition challenging results of MCA elections shall be heard and determined by the election court.
Relief granted	**Article 140(3) of the Constitution** – if the Supreme Court determines the election of the President-elect to be invalid, a fresh election shall be held within sixty days (60) after the determination. **– Section 80(4) of the Elections Act, 2011** – an election court may by order direct IEBC to	**– Section 80(4) of the Elections Act, 2011** – an election court may by order direct IEBC to issue a certificate of election to a Member of Parliament if— (a) upon recount of the ballots cast, the winner is apparent; and (b) that winner is found not to have committed an election offence. **– Section 82 of the Elections Act, 2011** – an order for a scrutiny	**Section 75(3) of the Elections Act, 2011**– the court may grant appropriate relief, including: (a) a declaration of whether or not the candidate whose election is questioned was validly elected; (b) a declaration of which candidate was validly elected; or	**Section 75(3) of the Elections Act, 2011**– the court may grant appropriate relief, including: (a) a declaration of whether or not the candidate whose election is questioned was validly elected; (b) a declaration of which candidate was validly elected; or (c) an order as to whether a fresh

	issue a certificate of election to a President if— (a) upon recount of the ballots cast, the winner is apparent; and (b) that winner is found not to have committed an election offence. **– Section 82 of the Elections Act, 2011** – an order for a scrutiny of votes and recounting of ballots cast, upon an application by a party during the hearing of an election petition, or the court acting *suo moto*. **– Section 86(1) of the Elections Act, 2011** – a certificate of court as to the validity of a presidential election. **– Section 86A, (1B) and (1C) of the Elections Act, 2011** – procedure in case of invalidation of a presidential election under **article 140(3) of the Constitution**. **– Section 87 of the Elections Act, 2011** – a	of votes and recounting of ballots cast, upon an application by a party during the hearing of an election petition, or the court acting *suo moto*. **– Section 86(1) of the Elections Act, 2011** – a certificate of court as to the validity of a parliamentary election. **– Section 87 of the Elections Act, 2011** – a determination and order of the election court on the occurrence of an electoral malpractice of a criminal nature, to be transmitted to the Director of Public Prosecutions (DPP) for criminal investigation and prosecution.	(c) an order as to whether a fresh election will be held or not. **– Section 82 of the Elections Act, 2011** – an order for a scrutiny of votes and recounting of ballots cast, upon an application by a party during the hearing of an election petition, or the court acting *suo moto*. **– Section 86(1) of the Elections Act, 2011** – a certificate of court as to the validity of a gubernatorial election. **– Section 86(1A), (1B) and (1C) of the Elections Act, 2011** – procedure in case of invalidation of a gubernatorial election. **– Section 87 of the Elections Act, 2011** – a determination and order of the election court on the occurrence of an electoral malpractice of a criminal nature, to be transmitted to the Director of	election will be held or not. **– Section 80(4) of the Elections Act, 2011** – an election court may by order direct IEBC to issue a certificate of election to a MCA if: (a) upon recount of the ballots cast, the winner is apparent; and (b) that winner is found not to have committed an election offence. **– Section 82 of the Elections Act, 2011** – an order for a scrutiny of votes and recounting of ballots cast, upon an application by a party during the hearing of an election petition, or the court acting *suo moto*. **– Section 86(1) of the Elections Act, 2011** – a certificate of court as to the validity of a MCA election. **– Section 87 of the Elections Act, 2011** – a determination and order of the election court on the occurrence of an electoral malpractice of a criminal nature, to be transmitted to

	determination and order of the election court on the occurrence of an electoral malpractice of a criminal nature, to be transmitted to the Director of Public Prosecutions (DPP) for criminal investigation and prosecution.		Public Prosecutions (DPP) for criminal investigation and prosecution.	the Director of Public Prosecutions (DPP) for criminal investigation and prosecution.
When to appeal	No appeal.	– **Section 85A(1) of the Elections Act, 2011** – an appeal from the High Court in an election petition concerning membership of the National Assembly or Senate shall lie to the Court of Appeal on matters of law only and shall be: (*a*) filed within **thirty (30) days** of the decision of the High Court; and (*b*) be heard and determined within **six (6) months** of the filing of the appeal. – A first appeal to the **Court of Appeal** in accordance with **article 164(3)(a) of the Constitution**, the **Court of Appeal Rules,**	– **Section 85A(1) of the Elections Act, 2011** – an appeal from the High Court in an election petition concerning the office of county governor shall lie to the Court of Appeal on matters of law only and shall be: (*a*) filed within **thirty (30) days** of the decision of the High Court; and (*b*) be heard and determined within **six (6) months** of the filing of the appeal. – A first appeal to the **Court of Appeal** in accordance with **article 164(3)(a) of the Constitution, the Court of**	**Section 75(4) of the Elections Act, 2011** – an appeal lies to the **High Court** on matters of law only, which appeal must be filed within **thirty (30) days** of the decision of the Resident Magistrate's Court. – **Rule 34 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017** makes provision on appeals from Resident Magistrates' Courts to the High Court, which take the form of a memorandum of appeal.

		2010,[181] **and Court of Appeal (Election Petition) Rules, 2017.** – **Rule 6 of the Court of Appeal (Election Petition) Rules, 2017** requires the **notice of appeal** (in the **Form EPA 1** set out in the Schedule) to be filed within **seven (7) days** of the date of the decision appealed against, without necessarily extracting the decree or order of the High Court. Under **Rule 7**, a notice of appeal is to be served within **five (5) days** of filing and the Respondent is to file a notice of address of service within **five (5) days** of service. Per **Rule 9**, a **record of appeal** is to be filed **within thirty (30) days** of the date of the judgment of the High Court, and is to be served within five (5) days of filing. Under **Rules 10 and 11**, a **notice of cross-appeal** (in the **Form EPA 2** set out in the Schedule**)** is filed **within seven (7) days of service of the**	**Appeal Rules, 2010,**[182] and **Court of Appeal (Election Petition) Rules, 2017.** – **Section 85A(2) of the Elections Act, 2011** – an appeal to the Court of Appeal under **section 85A(1) of the Act** shall act as a stay of the certificate of the election court certifying the results of an election until the appeal is heard and determined. – A further appeal to the **Supreme Court** in accordance with **article 163(3)(b)(i), (4) and (5) of the Constitution.**	

[181] Rule 35 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017.
[182] Ibid.

		record of appeal and **served with five (5) days of service;** application to strike out the notice of appeal and the record also follow the same timelines **(Rule 19).** **N.B.:** The notice of appeal acts as a stay of the judgment/order/decree of the High Court but shall lapse if no record of appeal is filed within thirty (30) days of the judgment of the High Court **(Rule 18)**. – **Section 85A(2) of the Elections Act, 2011** – an appeal to the Court of Appeal under **section 85A(1) of the Act** shall act as a stay of the certificate of the election court certifying the results of an election until the appeal is heard and determined. – A further appeal to the **Supreme Court** in accordance with **article 163(3)(b)(i), (4) and (5) of the Constitution.**		
How long for the court to determine the appeal	Not applicable	– **Rule 23 of the Court of Appeal (Election Petition) Rules, 2017** – the appeal shall be heard and determined within six (6) months of the date of judgment of the High Court.	– **Rule 23 of the Court of Appeal (Election Petition) Rules, 2017** – the appeal shall be heard and determined within six (6) months of	**Section 75(4)(b) of the Elections Act, 2011**, appeals from the Resident Magistrate Court to the High Court, on points of law only, must be heard and

		– **Rule 27 of the Court of Appeal (Election Petition) Rules, 2017** – upon filing an appeal, the Appellant must deposit a sum of **KES 500,000/= as security for costs of the appeal.**	the date of judgment of the High Court. – **Rule 27 of the Court of Appeal (Election Petition) Rules, 2017** – upon filing an appeal, the Appellant must deposit a sum of **KES 500,000/= as security for costs of the appeal.**	determined within **six (6) months** from the date of filing of the appeal.

5.3 Case Studies on Team Dynamics in Litigating Election Petitions

Prof. Tom Ojienda & Associates has handled a number of election petitions before the election courts, including other electoral disputes handled via other judicial means. Some of the cases handled are:

(a) ***Joseph Oyugi Magwanga & another v Independent Electoral and Boundaries Commission & 3 others*** **[2018] eKLR, HC (Homa Bay), Election Pet No 1 of 2017, (Karanja, J), judgment dated 20 February 2018:**

- Appearing for the 3rd and 4th Respondents.
- Challenging the election of the County Governor for the County of Homa Bay that declared the 3rd Respondent as the winner.
- Election of the 3rd Respondent (County Governor, Homa Bay County) invalidated.

(b) ***Cyprian Awiti & another v Independent Electoral and Boundaries Commission & 3 others*** **[2018] eKLR, CoA (Kisumu) Election Pet Appeal No 5 of 2018 (*Waki, Sichale & Otieno-Odek JJA*), judgment dated 19 July 2018** (being an appeal from the High Court of Kenya at Homa-Bay in Election Pet No 1 of 2017):

- Appearing alongside James Orengo SC and Otiende Amollo SC for the Appellants.

- Challenging the High Court's decision to invalidate the election of the County Governor, Homa Bay County and that declared the 1st Appellant as the winner.
- Appeal dismissed.

(c) ***Cyprian Awiti & another v Independent Electoral and Boundaries Commission & 2 others*** **[2019] eKLR, SCoK (Nairobi) Pet No 17 of 2018, (Maraga, CJ & P; Ibrahim, Ojwang, Wanjala, Njoki Ndungu & Lenaola, SCJJ), judgment dated 7 February 2019** (being an appeal from the judgment and decree of the Court of Appeal at Kisumu in Court of Appeal Election Pet No 5 of 2018):

- Appearing alongside James Orengo, SC and Otiende Amollo, SC for the Appellants.
- Challenging the Court of Appeal's decision in affirming the trial court's decision in invalidating the Appellant's election as declared by IEBC.
- Appeal allowed and the election results for County Governor, Homa Bay County found to be valid.

(d) ***Lenny Maxwell Kivuti v The Independent Electoral and Boundaries Commission (IEBC) & 3 others*** **[2018] eKLR, HC (Embu), Election Pet No 1 of 2017, (Musyoka, J), judgment dated 22 February 2018:**

- Appearing for the Petitioner.
- Challenging the declaration of the 3rd Respondent as the County Governor, Embu County.
- Election of the 3rd Respondent (County Governor, Embu County) invalidated.

(e) ***Martin Nyaga Wambora v Lenny Maxwell Kivuti & 3 others*****, CA (Nyeri) Election Pet Appeal No 6 of 2018 (Being an appeal from the High Court of Kenya at Embu in Election Pet No 1 of 2017),**

(*Ouko, Musinga and Sichale, JJA*), judgment dated 17 August 2018:

- Appearing for the 1st Respondent**.**
- Challenging the High Court's decision to invalidate the election of County Governor, Embu County and that declared the Appellant as the winner.
- Appeal allowed, judgment of the HC set aside.

(f) ***Lenny Maxwell Kivuti v Independent Electoral and Boundaries Commission (IEBC) & 3 others*** **[2019] eKLR, SCoK (Nairobi) Pet No 17 of 2018, (*Maraga, CJ & P; Ibrahim, Ojwang, Wanjala, Njoki Ndungu & Lenaola, SCJJ*) judgment dated 30 January 2019** (being an appeal from the judgment and decree of the Court of Appeal at Nyeri in Court of Appeal Election Pet No 6 of 2018):

- Appearing alongside Ngatia, SC for the Petitioner**.**
- Challenging the Court of Appeal's decision in dismissing the trial court's decision in invalidating the 3rd Respondent's election as declared by IEBC.
- Appeal dismissed.

(g) ***Ferdinard Ndung'u Waititu v Independent Electoral & Boundaries Commission (IEBC) & 8 others*** **[2013] eKLR, HC (Nairobi), Election Pet No 1 of 2013, (Mwongo, PJ):**

- Appearing for the 4th and 5th Respondents**.**
- Petition challenging the declaration of the 4th Respondent as County Governor, Nairobi County.
- Election of the 4th Respondent (County Governor, Nairobi County) upheld.

(h) ***Ferdinard Ndung'u Waititu v Independent Electoral & Boundaries Commission (IEBC) & 8 others*** **[2014] eKLR, CoA (Nairobi) Election Pet Appeal No 324 of 2013 (*Warsame, Kariuki***

and Kiage, JJA**)** (being an appeal from the High Court of Kenya at Nairobi in Election Pet No 1 of 2013):

- Appearing alongside Mr. Mugambi, for the 4th and 5th Respondents**.**
- An election petition appeal challenging the High Court's decision in upholding the election results for County Governor, Nairobi County.
- Appeal allowed.

(i) ***Evans Odhiambo Kidero & 4 others v Ferdinand Ndungu Waititu & 4 others*** **[2014] eKLR, SCoK (Nairobi) Pet No 18 of 2014 (Mutunga, CJ & P; Rawal, DCJ &V-P, Tunoi, Ibrahim, Ojwang, Wanjala & Njoki Ndungu, SCJJ)** (being an appeal from the judgment and decree of the Court of Appeal at Nairobi in Court of Appeal Election Pet No 324 of 2013):

- Appearing alongside Nowrojee, SC and Oduol for the 1st and 2nd Appellants.
- Challenging the Court of Appeal's decision in dismissing the trial court's decision in upholding the 1st Appellant's election as declared by IEBC.
- Appeal allowed.

(j) ***Dickson Mwenda Kithinji v Gatirau Peter Munya & 2 others*** **[2013] eKLR, HC (Meru), Election Pet No 1 of 2013, (Makau, J), judgment dated 23 September 2013:**

- Challenging the declaration of the 1st Respondent as County Governor, Meru County.
- Election of the 1st Respondent (County Governor, Meru County) upheld.

(k) ***Dickson Mwenda Githinji v Gatirau Peter Munya & 2 others*** **[2014] eKLR, CoA (Nyeri) Election Pet Appeal No 38 of 2013, (*Visram, Mohammed and Otieno-Odek, JJA*), judgment dated 12**

March 2014 (being an appeal from the High Court of Kenya at Meru in Election Pet No 1 of 2013):

- Challenging the High Court's decision in upholding the election results for County Governor, Meru County.
- Appeal allowed.

(l) ***Gatirau Peter Munya v Dickson Mwenda Kithinji & 3 others*** **[2014] eKLR, SCoK (Nairobi), Pet No 2B of 2014** (Mutunga, CJ & P; Rawal, DCJ &V-P, Tunoi, Ibrahim, Ojwang, Wanjala & Njoki Ndungu, SCJJ) (being an appeal from the judgment and decree of the Court of Appeal at Nairobi in Court of Appeal Election Pet No 38 of 2013):

- Appearing alongside Okong'o Omogeni, SC for the Appellant.
- Challenging the Court of Appeal's decision in dismissing the trial court's decision in upholding the Appellant's election as declared by the 2nd Respondent.
- Appealed allowed.

(m) ***Aziz Kassim Ibrahim v Independent Electoral and Boundaries Commission (IEBC) & 4 others*** **[2017] eKLR, CMCC (Milimani, Nairobi), Election Pet No 6A of 2017, (Hon Gesora, CM), judgment dated 24 January 2018:**

- Appearing for the Petitioner.
- Challenging the election results for the position of Member of County Assembly, Kwa Njenga Ward, which declared the 5th Respondent as the winner.
- Election of the 5th Respondent (MCA, Kwa Njenga Ward) upheld.

(n) ***Musa Cherutich Sirma v Independent Electoral and Boundaries Commission (IEBC) & 2 others*** **[2018] eKLR, HC (Kabarnet), Election Pet No 1 of 2017, (Muriithi J), judgment dated 2 March 2018:**

- Appearing for the Petitioner.
- Challenging the election results for the position of Member of National Assembly, Eldama Ravine Constituency, which declared the 3rd Respondent as the winner.
- Election of the 3rd Respondent (Member of National Assembly, Eldama Ravine Constituency) upheld.

(o) ***Hussein Abshiro Herin & 23 others v Independent Electoral and Boundaries Commission & 2 others*** **[2018] eKLR, HC (Nairobi), Election Pet No 7 of 2017, (Ong'udi J), judgment dated 27 February 2017:**

- Appearing for the Petitioners.
- Challenging the election results for the position of Member of National Assembly, Mandera North Constituency, which declared the 3rd Respondent as the winner.
- Election of the 3rd Respondent (Member of National Assembly, Mandera North Constituency) upheld.

(p) ***Geoffrey Okuto Otieno v Orange Democratic Movement & 2 others*** **[2017] eKLR, HC (Nairobi), Election Pet Appeal No 61 of 2017, (Riechi, J), judgment dated 25 May 2017** (being an appeal from the decision of the PPDT in case No 177 of 2017):

- Appearing for the Appellant.
- Challenging the decision of the PPDT directing the 1st Respondent to undertake a fresh nomination process for MCA Hospital Ward, Mathare Constituency.
- Appeal dismissed and 1st Respondent directed to conduct fresh nomination exercise.

(q) ***Joseph Mboya Nyamuthe v Orange Democratic Movement & 4 others*** **[2017] eKLR, HC (Nairobi), Election Pet Appeal No 5 of 2017, (Onyiego, J), judgment dated 10 May 2017** (being an appeal from the decision of the PPDT in Complaint No 69 of 2017):

- Appearing for the 2nd Respondent.
- Challenging the decision of the PPDT to dismiss the Appellant's claim that it lacked jurisdiction to hear the matter.
- Appeal allowed and the dismissal by the PPDT set aside.

(r) ***Abdirahman Adan Abdikadir & another v Independent Electoral & Boundaries Commission & 2 others*** **[2018] eKLR, HC (Nairobi), Election Pets No 13 & 16 of 2017, (Mwongo, PJ), judgment of 31 January 2018:**

- Appearing for the 1st Petitioner**.**
- Challenging the declaration of the 3rd Respondent as Senator, Wajir County.
- Election of the 3rd Respondent (Senator, Wajir County) upheld.

(s) ***Hassan Noor Hassan v The Independent Electoral and Boundaries Commission (IEBC) & 3 others*** **[2018] eKLR, HC (Nairobi), Election Pet No 1 of 2017, (F A Ochieng, J):**

- Appearing for the Petitioner**.**
- Challenging the declaration of the 3rd Respondent as County Governor, Mandera County.
- Election of the 3rd Respondent (County Governor, Mandera County) upheld.

(t) ***Harun Meitamei Lempaka v Lemanken Aramat & 2 others*** **[2013] eKLR, CoA (Nairobi), Election Pet Appeal No 276 of 2013, (*Waki, Musinga and Gatembu, JJA*), judgment dated 28 March 2014** (being an appeal from the High Court of Kenya at Nakuru in Election Pet No 2 of 2013):

- Challenging the High Court's decision in upholding the election results for the Member of the National Assembly, Narok East Constituency.
- Appeal dismissed.

(u) ***Lemanken Aramat v Harun Meitamei Lempaka & 2 others*** **[2014] eKLR, SCoK (Nairobi), Pet No 5 of 2014** (Rawal, DCJ &V-P, Tunoi, Ibrahim, Ojwang, Wanjala & Njoki Ndungu, SCJJ), judgment dated 6 August 2014 (being an appeal from the judgment and decree of the Court of Appeal at Nairobi in Court of Appeal Election Pet No 276 of 2013):

- Appearing for the Appellant.
- Challenging the Court of Appeal's decision in setting aside the trial court's judgment and ordering for recount, thus invalidating the election results.
- Appeal allowed.

6 Conclusion

This paper has considered the various EDR mechanisms put in place in Kenya to resolve pre-election and post-election disputes. The paper has considered the legal framework and principles that underlie the electoral system in Kenya and the parameters and tools for managing team dynamics in election petitions as pertains to the litigation of electoral disputes.

Critiquing the place of Environmental Impact Assessment as a tool for Enhancing Environmental Protection in Kenya

By: ***Peter Mwangi Muriithi****

Abstract

In a bid to protect the environment, the environmental law in Kenya has deliberately imposed an obligation on persons wishing to undertake various programmes, activities or projects to undertake Environmental Impact Assessment. Indeed, Environmental Impact Assessment has mandatorily become a prerequisite to undertaking various programmes, activities or projects that have an impact on the environment. This demonstrates the seminal role of environmental impact assessment in protecting the environment in Kenya.

This paper seeks to critique the role of Environmental Impact Assessment in the protection of the environment in Kenya. In doing so, the paper will analyze; what constitutes Environmental Impact Assessment, the legal framework governing Environmental Impact Assessment, the importance of Environmental Impact Assessment as a tool for enhancing environmental protection and lastly offer a conclusion.

1.0 Introduction

Development can have and has had over the years, major impacts on the environment, by degrading soils and waterways, altering landscapes and threatening biodiversity. In addition to harming our surroundings, these impacts can and do have significant economic costs and negatively affect human health. Environmental Impact Assessments (herein "EIA") provide a tool that would assist in the anticipation and minimization of development's negative effects on the environment.[1]

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[1] United Nations Environment Programme, Training Manual on International Environmental Law page 295

Environmental Impact Assessments is a process of evaluating the likely environmental impacts of a proposed project or development, taking into account inter-related socio-economic, cultural and human-health impacts, both beneficial and adverse.[2]

United Nations Environment Programme (herein UNEP), defines *Environmental Impact Assessment* as a tool used to identify the environmental, social and economic impacts of a project prior to decision-making. It aims to predict environmental impacts at an early stage in project planning and design, find ways and means to reduce adverse impacts, shape projects to suit the local environment and present the predictions and options to decision-makers. [3] Statutorily, Environmental Impact Assessment is defined as a systematic examination conducted to determine whether or not a programme, activity or project will have any adverse impacts on the environment.[4]

On the other hand, environmental protection has been defined as the practice of protecting the natural environment by individuals, organizations and governments. [5] Its objectives are to conserve natural resources and the

[2]<https://www.cbd.int/impact/whatis.shtml>lastly accessed on 2/5/22

[3]<https://www.unep.org/resources/report/environmental-impact-assessment-and-strategic-environmental-assessment-towards> lastly accessed on 2/5/22

[4]Section 2 of the Environmental Management and Co-Ordination Act No. 8 of 1999 and Regulation No. 2 of Environmental (Impact Assessment and Audit) Regulations, 2003

[5]<yourdictionary.com.> lastly accessed on 2/5/22

(Law Insider Dictionary-Environmental protection means any action designed to remedy or prevent damage to physical surroundings or natural resources by human activities, including to adapt to and mitigate climate change, to reduce the risk of such damage or to lead to more efficient and sustainable use of natural resources, including the use of sustainable renewable feed stocks, including and energy-saving measures and the use of renewable sources of energy and other techniques to reduce greenhouse gas emissions

<https://www.lawinsider.com/dictionary/environmental-protection> lastly accessed on 2/5/22

existing natural environment and, where possible, to repair damage and reverse trends.[6]

2.0 The Legal Framework Governing Environmental Impact Assessment in Kenya

Environmental Impact Assessment in Kenya is delimited by the Environmental Management and Co-Ordination Act No. 8 of 1999 and its subsidiary legislation namely Environmental (Impact Assessment and Audit) Regulations, 2003.Environmental Management and Co-Ordination Act No. 8 of 1999 under Part VI provides for Environmental Impact Assessment. Section 57A (1) of Cap No.8 of 1999 makes strategic environmental assessment *mandatory* for all policies, plans and programmes before their implementation.

Further, Section 57A (2) of Cap No.8 of 1999 provides that for the avoidance of doubt, the plans, programmes and policies are those that are; *(a) subject to preparation or adoption by an authority at regional, national, county or local level, or which are prepared by an authority for adoption through a legislative procedure by Parliament, Government or if regional, by agreements between the governments or regional authorities, as the case may be; (b) determined by the Authority*[7] *as likely to have significant effects on the environment.*

This delimitation of policies, plans and programmes that are subject to strategic environmental assessment by Section 57A (2) of Cap No.8 of 1999 widens the scope of projects[8] that are subject to environmental impact assessment.

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[6] <"What is Environmental Protection? Definition of Environmental Protection (Bryan A. Garner Black's Law Dictionary 9th Ed.)". The Law Dictionary. See; https://www.igi-global.com/dictionary/environmental-protection/10073> lastly accessed on 2/5/22

[7]Section 2 of the Environmental Management and Co-Ordination Act No. 8 of 1999 defines "Authority" as the National Environment Management Authority established under section 7 Cap No. 8 of 1999.

[8]Section 2 of the Environmental Management and Co-Ordination Act No. 8 of 1999 defines a "project" to include any project, programme or policy that leads to projects which may have an impact on the environment.

Section 58 of Cap No.8 of 1999 provides for the application of an Environmental Impact Assessment licence from the National Environment Management Authority (herein Authority) by a proponent of a project, before financing, commencing, proceeding with, carrying out, executing or conducting the project.[9]

Section 59 of Cap No.8 of 1999 imposes an obligation upon the National Environment Management Authority to publish the Environmental Impact Assessment study report received from a proponent of a project in at least two newspapers circulating in the area of the project and over the radio a notice.

The importance of Environmental Impact Assessment is further demonstrated by Section 62 of Cap No.8 of 1999 which gives the National Environment Management Authority power to request a proponent of a project to carry out at his own expense further evaluation or Environmental Impact Assessment study, review or submit additional information to ensure that the environmental impact assessment study, review or evaluation report is as accurate and exhaustive as possible.[10]

It is also noteworthy that Section 67 of Cap No.8 of 1999 gives the National Environment Management Authority power to revoke, suspend or cancel an Environmental Impact Assessment Licence issued to a proponent.

Lastly, the subsidiary legislation namely; Environmental (Impact Assessment and Audit) Regulations, 2003 in detail outlines the practical aspects and steps that should be followed in acquiring an Environmental Impact Assessment Licence by a proponent.

The Environmental (Impact Assessment and Audit) Regulations, 2003 under regulation 42 outlines what the environmental impact assessment that is to be carried out on a project should consider. This includes; *(a) the use of natural resources; (b) the protection and conservation of biodiversity; (c)*

[9]Environmental Management and Co-Ordination Act No. 8 of 1999
[10]Section 62 of Cap No.8 of 1999; Further Environmental Impact Assessment

human settlement and cultural issues; (d) socio-economic factors; and (e) the protection, conservation of natural physical surroundings of scenic beauty as well as protection and conservation of the built environment of historic or cultural significance. This demonstrates the significance of environmental impact assessment in environmental protection.

Further, regulation 46 of Environmental (Impact Assessment and Audit) Regulations, 2003 provides for an *appeal* within sixty (60) days to the National Environment Tribunal [11] where a person is aggrieved by the decision of the National Environment Management Authority on the Environmental Impact Assessment Licence.

This includes where any person who is aggrieved by; (a) a refusal to grant a licence or by a refusal to transfer a licence by the Authority(b) the imposition of any condition, limitation or restriction on a licence (c) the revocation, suspension or variation of a licence issued by the Authority; (d) the amount of money which the person is required to pay as fees by the Authority (e) the imposition of any environmental restoration order or environmental improvement order on the project by the Authority or (f) the approval or reinstatement by the Authority of an environmental impact assessment licence.[12]

Environmental Impact Assessment has found its place in international law as captured by the Convention on Environmental Impact Assessment in a Transboundary Context (informally called the Espoo Convention). [13] However, Kenya is not a signatory and/or has not ratified the Convention on Environmental Impact Assessment in a Transboundary Context which was signed in Espoo, Finland, in 1991 and entered into force in 1997.[14]

[11] Established under Section 125 of the Environmental Management and Co-Ordination Act No. 8 of 1999

[12] Regulation 46 of Environmental (Impact Assessment and Audit) Regulations, 2003

[13] <https://unece.org/fileadmin/DAM/env/eia/documents/legaltexts/Espoo_Convention_authentic_ENG.pdf> lastly accessed on 2/5/22

[14] <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-4-b&chapter=27#1> lastly accessed on 2/5/22

The Convention on Environmental Impact Assessment in a Transboundary Context sets out the obligations of Parties, that is, States that have agreed to be bound by the Convention to carry out an Environmental Impact Assessment of certain activities at an early stage of planning. [15]

The Convention on Environmental Impact Assessment in a Transboundary Context also lays down the general obligation of States to notify and consult each other on all major projects under consideration that are likely to have a significant adverse environmental impact across boundaries.[16]

3.0 The importance of Environmental Impact Assessment as a tool for enhancing environmental protection in Kenya

Environmental Impact Assessment arose out of the need to curb pollution and unnecessary degradation of natural resources caused by rapid population growth, industrialization, agricultural development, and technological progress. EIA recognizes that natural resources are finite and incapable of absorbing the unchecked demands of modern society. Over time, *EIA* has become one of the most effective and practical tools to protect the environment as it is a means of promoting sustainable development and its integrative aspects. [17]

It is worth noting that, when Environmental Impact Assessment is undertaken in the early stages of project planning and design, it can help shape development in a manner that best suits the local environment and is most responsive to human needs.[18]

Indeed, without any shadow of a doubt, EIA serves as a standard for determining whether or not due diligence was exercised by persons wishing

[15] Article 2 of the Convention on Environmental Impact Assessment in a Transboundary Context
[16] Article 3 of the Convention on Environmental Impact Assessment in a Transboundary Context
[17] United Nations Environment Programme, Training Manual on International Environmental Law page 295
[18]Ibid No.17

to undertake various programmes, activities or projects that would have an impact on the environment.[19]

By using EIA both environmental and economic benefits can be achieved, such as reduced cost and time of project implementation and design, avoided treatment/clean-up costs and impacts of laws and regulations. [20]

EIA assesses the impacts of a proposed project before work on the project begins. In some circumstances, where the impact of policies, plans and programmes is under consideration, EIA is carried out as a Strategic Environmental Assessment ("SEA")[21] and provides decision-makers with information about the consequences of the development programmes under consideration.[22]

In addition to helping formulate proper development policy, EIA also provides for *public involvement in the decision making process*. Thus, EIA serves three main functions[23]:

a) *Integration of environmental issues into planning and decision-making;*
b) *Anticipation and minimization of environmental damage; and*
c) *Public participation in decision-making and environmental conservation*

[19] United Nations Environment Programme, Training Manual on International Environmental Law page 33
[20]<https://www.cbd.int/impact/whatis.shtml>lastly accessed on 2/5/22
[21]Barry Dalal-Clayton and Barry Sadler, Strategic environmental assessment: A rapidly evolving approach (Defined Strategic Environmental Assessment (SEA) as the formalized, systematic and comprehensive process of identifying and evaluating the environmental consequences of proposed policies, plans or programmes to ensure that they are fully included and appropriately addressed at the earliest possible stage of decision-making on a par with economic and social considerations.) <https://www.cbd.int/impact/whatis.shtml> lastly accessed on 2/5/22
[22] United Nations Environment Programme, Training Manual on International Environmental Law page 295
[23]Ibid No 22

EIA's focus on environmental conservation and sustainable development echoes general principles and concepts of customary law. The focus is embodied in many Multilateral Environmental Agreements, including the Convention on Biological Diversity and the United Nations Convention on the Law of the Sea.[24]

Environmental Principle 17 of the UNCED Rio Declaration states verbatim that *"Environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority."*[25]

Thus, EIA reflects the *"no-harm"* obligation of customary law in the trans-boundary context. [26] The fundamental components of an EIA would necessarily involve the following stages[27]:

a. *Screening* to determine which projects or developments require a full or partial impact assessment study;
b. *Scoping* to identify which potential impacts are relevant to assess (based on legislative requirements, international conventions, expert knowledge and public involvement), to identify alternative solutions that avoid, mitigate or compensate for adverse impacts on biodiversity (including the option of not proceeding with the development, finding alternative designs or sites which avoid the impacts, incorporating safeguards in the design of the project, or

[24] Article 14 of the Convention on Biological Diversity and the United Nations Convention on the Law of the Sea provides; Each Contracting Party, as far as possible and as appropriate, shall: Introduce appropriate procedures requiring **environmental impact assessment** of its proposed projects that are likely to have significant adverse effects on biological diversity with a view to avoiding or minimizing such effects and, where appropriate. allow for public participation in such procedures;

[25] <https://www.cbd.int/doc/ref/riodeclaration.shtml#:~:text=Principle%2017,of%20a%20competent%20national%20authority.>lastly accessed on 2/5/22

[26] United Nations Environment Programme, Training Manual on International Environmental Law page 295

[27]<https://www.cbd.int/impact/whatis.shtml> lastly accessed on 2/5/22

providing compensation for adverse impacts), and finally to derive terms of reference for the impact assessment;

c. *Assessment and evaluation of impacts and development of alternatives*, to predict and identify the likely environmental impacts of a proposed project or development, including the detailed elaboration of alternatives;
d. *Reporting the Environmental Impact Statement (EIS) or EIA report*, including an environmental management plan (EMP), and a non-technical summary for the general audience.
e. *Review of the Environmental Impact Statement (EIS)*, based on the terms of reference (scoping) and public (including authority) participation.
f. *Decision-making* on whether to approve the project or not and under what conditions; and
g. *Monitoring, compliance, enforcement and environmental auditing.* Monitor whether the predicted impacts and proposed mitigation measures occur as defined in the EMP. Verify the compliance of the proponent with the EMP, to ensure that unpredicted impacts or failed mitigation measures are identified and addressed in a timely fashion.

However, despite the importance of EIA in environmental protection, it 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 how the reports are presented is wanting. The reports are usually too wordy and this makes it difficult for a layperson to capture the important details. This goes hand in hand with the method used to relay this information. EIA advertisements for the public are mostly done in daily newspapers. [28]

[28]Nick 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

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. [29]

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, the 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 maybe 79%, often the message is lost because of inadequate interpretation. Consequently, there is an inadequate explanation of the background and technical material that may help the public to contribute effectively in EIA deliberations*." [30]
It is however my recommendation that to prevent Environmental Impact Assessment from being a barrier to meaningful public participation as pointed out above, the pamphlets, posters, as well as EIA study reports should be written in an indigenous language.[31] This will help the public digest the information as well as contribute effectively to public participation events. Simple examples and illustrations, especially diagrams should be included as well. Diagrams tend to stick in the mind better than plain text.

4.0 Conclusion

Premised on the foregoing, it is not in doubt the significance of Environmental Impact Assessment as a tool for enhancing environmental

[29]Ibid No. 28
[30]Nick 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
[31]This is in accordance with, Section 59 of Cap No.8 of 1999 which imposes an obligation upon the National Environment Management Authority to publish the environmental impact assessment study report received from a proponent of a project in at least two newspapers circulating in the area of the project and over the radio a notice.

protection in Kenya. Environmental Impact Assessment act as a preventive measure to promote environmental protection. The preliminary stage at which Environmental Impact Assessment has to be undertaken in accordance with the law[32] means that it can act as a tool for enhancing environmental protection and upholding the right to a clean and healthy environment as guaranteed under *Article 42 of the Constitution* of Kenya 2010.

[32]Section 57A of the Environmental Management and Co-Ordination Act No. 8 of 1999 and Regulation 4 of Environmental (Impact Assessment and Audit) Regulations, 2003

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Achieving Environmental Security in Kenya

By: ***Kariuki Muigua****

Abstract

The importance of the environment cannot be overstated since without the environment, there would be no survival of any human, animal or plant life. A clean and secure environment facilitates the right to life. Although there have been widespread calls for a more secure environment, backed with conventions and global agreements on the present problem of an environment that is under threat, the uptake of actions to curb the same has been dismal and insufficient, to say the least. State and governmental efforts have not been satisfactory to effect the agreed upon principles and mechanisms. While a proper environmental security mechanism ensures that access to environmental goods and services is available to all, many Kenyans continue to remain out in the cold with no ability to benefit from the environment at the moment. Many user groups are still finding an inability to ingress environmental goods and services, facing barriers such as poor sanitation, lack of clean water, and an array of pollutants.

In this paper, the author examines the importance of environmental security as an instrument of the realisation and actualization of human and environmental rights. The discourse analyses how a secure environment can promote or guarantee the proper expression of such rights. It is argued that in the absence of environmental security, proper development cannot be sustainably achieved. Therefore, achieving environmental security both as a human right prerogative and an environmental right will ensure that a populace is able to enjoy access to environmental goods and services and in so doing, development can be adequately pursued and responsibly achieved.

1. Introduction

The importance of the environment cannot be overstated since it ensures survival of any kind of life. The enjoyment of the right to life depends on a clean and healthy environment.[1] A secure environment makes possible the

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exercise of the right to life certain by ensuring that any threats to life are neutralized. In this paper, the author examines the concept of environmental security as an instrument for the realisation and actualization of human and environmental rights. The approach adopted is both anthropocentric and ecocentric. The ecocentric approach to environmental security is given attention considering that it advocates for the conservation of the environment as a matter of right and not merely because of the benefits that accrue to the human beings.[2] The discourse analyses how a secure environment can promote or guarantee the proper expression of human rights. It is argued that in the absence of environmental security, proper development cannot be sustainably achieved. Therefore, achieving environmental security first, as a human right prerogative will ensure that the Kenyan populace is able to enjoy access to environmental goods and services and in so doing, development can be adequately pursued and responsibly achieved.

2. Conceptualising Environmental Security

This section provides a brief overview on the concept of environmental security as envisaged in various international legal instruments on environmental rights as well as publications by different authors. This is important considering that environmental rights and the associated elements have for long been contested as to their legitimacy within the international discourse on human rights, and while they have continually gained acceptance, the debate is yet to be settled. This is despite the global acknowledgement of the indispensable role of environment in human survival. Environmental degradation has become a worrying trend the world

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[1] See generally, A. Stock, *The Right to a Healthy Environment: How to use international legal mechanism for the protection of our environment and our health – A Manual*, (Women in Europe for a Common Future, Utrecht/Munich, September 2007).

[2] See generally, 'Species Extinction Is a Great Moral Wrong' (Elsevier Connect) available at <https://www.elsevier.com/connect/species-extinction-is-a-great-moral-wrong> accessed on 06/05/2022

over, thus, prompting discussions at all levels on how best to address the same. Indeed, it has been observed that over the last several years, environmental degradation and resource scarcity have come to be perceived as threats not only to human well-being and prosperity but also to international security.[3] This has also led to calls for reconceptualisation and re-evaluation of security as traditionally understood. This is due to the growing potential for conflict over scarce or degraded resources, in order to include environmental security as an element of human security.[4] A secure environment makes it possible to exercise and enjoy the right to life by ensuring that any threats to life, and extension to human beings, are neutralized. It is argued that the notion of "environmental security," should be understood to have two dimensions. On the one hand, in placing emphasis upon the environmental dimension, security means maintaining an ecological balance, at least to the extent necessary to sustain resource supplies and life-support systems. On the other hand, in emphasizing the dimension of security in the traditional sense, the term refers to the prevention and management of conflicts precipitated by environmental decline.[5]

Environmental security has also been defined as the process of peacefully reducing human vulnerability to human-induced environmental degradation by addressing the root causes of environmental degradation and human insecurity.[6] This broader conception of environmental security, it has been argued, is crucial because, at least in the long term, security, even in the

[3] J. Brunnee, "Environmental Security in the Twenty-First Century: New Momentum for the Development of International Environmental Law?" *Fordham International Law Journal*, Vol. 18, 1995, pp. 1742-1747 at p. 1742.
[4] Ibid, p. 1742; See also, N. Græger, "Environmental Security?" *Journal of Peace Research,* Vol. 33, No. 1 (Feb., 1996), pp. 109-116, at pp. 109-110; See also A.S. Tolentino, "Asean environmental security concerns," *The Manila Times*, October 3, 2015 10:16 pm, available at http://www.manilatimes.net/asean-environmental-security-concerns/221970/ [Accessed on 06/05/2022].
[5] J. Brunnee, "Environmental Security in the Twenty-First Century: New Momentum for the Development of International Environmental Law?" *op cit,* p. 1742.
[6] F. Rita, "The Environmental Security Debate and Its Significance for Climate Change," *The International Spectator: Italian Journal of International Affairs*, Vol. 43, Issue 3, 2008, pp.51-65 at p. 56.

traditional sense, can be ensured only if security in the environmental sense is emphasized. Only where ecological balance is maintained, resources are protected, and supplies ensured, will the potential for conflict be significantly reduced. Further, focusing on common environmental interests rather than on competing strategic interests will promote international cooperation and, ultimately, security.[7] To buttress this, it has been argued that *few threats to peace and survival of the human community are greater than those posed by the prospects of cumulative and irreversible degradation of the biosphere on which human life depends. True security cannot be achieved by mounting buildup of weapons (defence in a narrow sense), but only by providing basic conditions for solving non-military problems which threaten them. Our survival depends not only on military balance, but on global cooperation to ensure a sustainable environment* (emphasis added).[8]

To assert the importance of environmental security as an aspect of human security, the Brundtland Commission argued that the whole notion of security as traditionally understood in terms of political and military threats to national sovereignty must be expanded to include the growing impacts of environmental stress - locally, nationally, regionally, and globally.[9] They observed that there are no military solutions to 'environmental insecurity'.[10]

There has been a growing linkage between environment and conflict.[11] Environmental deficiencies supply conditions which render conflict all the

[7] Ibid; See also, P. Nijkamp, "Environmental Security and Sustainability in Natural Resource Management: A Decision Support Framework," *Serie Research Memoranda*, 1997, pp. 4-5.
Available at http://degree.ubvu.vu.nl/RePEc/vua/wpaper/pdf/19970063.pdf [Accessed on 06/05/2022].
[8] World Commission on Environment and Development, *Our Common Future: Report of the World Commission on Environment and Development*, 1987, A/42/427.
[9] Ibid, para. 86.
[10] Ibid.
[11] B. Bromwich, "Environmental degradation and conflict in Darfur: implications for peace and recovery," *Humanitarian Exchange Magazine*, Issue 39, July 2008, available at http://www.odihpn.org/humanitarian-exchange-magazine/issue-39/environmental-degradation-and-conflict-in-darfur-implications-for-peace-and-recovery [Accessed on 06/05/2022].

more likely. They can serve to determine the source of conflict, they can act as multipliers that aggravate core causes of conflict, and they can help to shape the nature of conflict. Moreover they can not only contribute to conflict, but also stimulate the growing use of force to repress disaffection among those who suffer the consequences of environmental decline.[12] As a result, it is concluded that national security is no longer about fighting forces and weaponry alone, but it relates increasingly to watersheds, forests, soil cover, croplands, genetic resources, climate and other factors rarely considered by military experts and political leaders, but that taken together deserve to be viewed as equally crucial to a nation's security as military prowess.[13]

Environmental security has been defined in different ways to fit various contexts, and despite the many attempts to define the same, the concept is understood differently by people of various professions in diverse countries.[14] For instance, it has been argued that in developing countries, environmental security has more to do with a household's ability to meet the demand for environmental resources in production and consumption activities.[15] In this regard, it is observed that for many of the four billion inhabitants in the developing countries, security is conceived at the most

[12] N. Myers, "Environmental Security: What's New and Different?" Available at http://www.envirosecurity.org/conference/working/newanddifferent.pdf [Accessed on 06/05/2022], p.4.
[13] Ibid, p.4; See also generally, B.R. Allenby, "Environmental Security: Concept and Implementation," *International Political Science Review / Revue internationale de science politique,* Vol. 21, No. 1 (Jan., 2000), pp. 5-21.
[14] O. Skarlato & I. Telesh, Environmental security and policymaking: concepts and practices in North America and Europe, a Review, *Rostock. Meeresbiolog. Beitr*, pp. 169-185, p. 170. Available at http://www.oekologie.uni-rostock.de/fileadmin/Mathnat_Bio_Oekologie/RMB/RMB_19/RMB_19-12.pdf [Accessed on 06/05/2022].
[15] S.S. Shrestha & P.B. Bhandari, "Environmental Security and Labor Migration in Nepal," *Paper for presentation at the IUSSP's XXV International Population Conference, Tours, France, July 18-23, 2005*, p. 2. Available at http://demoscope.ru/weekly/knigi/tours_2005/papers/iussp2005s52252.pdf [Accessed on 06/05/2022].

basic level of the struggle for individual survival.[16] It is estimated that over eight hundred million live in absolute poverty and deprivation, five hundred million are malnourished, and many millions have no access to safe drinking-water and do not have the income necessary to purchase food.[17] They lack protection against the consequences of environmental degradation and natural calamities, such as floods and drought, which, particularly in Africa, have produced famine and suffering of unprecedented proportions.[18]

There are scholars who have argued that not all environmental problems lead to conflict, and not all conflicts stem from environmental problems, and that indeed it is rare for linkages to be directly and exclusively causative.[19] It is argued that while environmental phenomena contribute to conflicts, they can rarely be described as sole causes: there are too many other variables mixed in, such as inefficient economies, unjust social systems and repressive governments, any of which can predispose a nation to instability-and thus, in turn, make it specially susceptible to environmental problems.[20] While this may be true, it is noteworthy that the link between the two is more pronounced in developing countries, like Kenya, where most people directly derive their livelihoods from the environment.[21]

Competition for scarce resources may lead to a 'survival of the fittest' situation.[22] In such circumstances, environmental degradation poses a higher

[16] United Nations, "Concepts of Security," *United Nations Publication, A/40/553*, 1986, p. 20, para. 86.
[17] Ibid.
[18] Ibid.
[19] N. Myers, "Environmental Security: What's New and Different?" *op cit*, p.3.
[20] Ibid, p.3; See also generally, N.R. Biswas, "Is the Environment a Security Threat? Environmental Security beyond Securitization," *International Affairs Review*, Vol. XX, No. 1, Winter 2011.
[21] See S. Bocchi, et al, 'Environmental Security: A Geographic Information System Analysis Approach—The Case of Kenya,' Environmental Management Vol. 37, No. 2, 2005, pp. 186–199, pp. 191-195.
[22] See generally, "Chapter 5: Survival at Stake: Violent Land Conflict in Africa," *Small Arms Survey 2013*, available at http://www.smallarmssurvey.org/fileadmin/docs/A-Yearbook/2013/en/Small-Arms-Survey-2013-Chapter-5-EN.pdf [Accessed on 06/05/2022].

potential for conflict, as every group fights for their survival.[23] Even where resources are abundant, conflicts can arise when one group controls a disproportionate portion of the same ("Resource capture"). Resource capture occurs when the supply of a resource decreases due to either depletion or degradation and/or demand increases (due to population and/or economic growth).[24] This encourages the more powerful groups in a society to exercise more control and even ownership of the scarce resource, thereby enhancing their wealth and power.[25] For instance, land has been an emotive issue in Kenya as it is in the hands of a few people in the country, and this has often led to tribal clashes.[26]

In this paper, environmental security is used to refer to an environmental condition that is able to fully satisfy the needs of the people living around an area, those who rely on it for their survival. Human security as an element of poverty eradication has been defined as: protection of the vital core of all human lives in ways that enhance human freedoms and human fulfillment. Human security means protecting fundamental freedoms – freedoms that are the essence of life. It involves protecting people from critical (severe) and pervasive (widespread) threats and situations. It includes using processes that build on people's strengths and aspirations, thus creating political, social, environmental, economic, military and cultural systems that together give people the building blocks of survival, livelihood and dignity. [27] Environmental conditions, being central to human security and survival,

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[23] See K. Bowman, *et al,* "Chapter 1: Environment for Development," (United Nations), available at http://www.unep.org/geo/geo4/report/01_Environment_for_Development.pdf [Accessed on 06/05/2022].

[24] S. Khagram, *et al*, "From the Environment and Human Security to Sustainable Security and Development," *Journal of Human Development*, Vol. 4, No. 2, July 2003, pp. 289-313, p. 295.

[25] Ibid.

[26] See the *Report of the Judicial Commission Appointed to Inquire into Tribal Clashes in Kenya'*, (the 'Akiwumi Commission'), (Government Printer, Nairobi, 1999).

[27] United Nations Human Security Unit, *Human Security in Theory and Practice: An Overview of the Human Security Concept and the United Nations Trust Fund for Human Security*, 2009, p. 5. Available at http://www.un.org/humansecurity/sites/www.un.org.humansecurity/files/human_security_in_theory_and_practice_english.pdf [Accessed on 06/05/2022].

must be addressed as one of the means of eradicating poverty. Human security can be threatened by various factors, including conflicts arising from scarce resources, as well as unhealthy environment.[28] This is the approach to environmental security that informs the discussion in this paper. The next section offers a brief overview of the international environmental law basis for promotion of the concept of environmental security for realisation of human rights and the greater sustainable development agenda.

3. Global Efforts towards Environmental Security

Environmental protection and conservation has been at the centre stage in the global economic, social and political discussions. Sustainable development agenda was informed by the need to ensure an environmentally sound world that can satisfy the needs of the current generation without compromising those of future generations. Indeed, it has been asserted that sustainable development has been the overarching goal of the international community since the UN Conference on Environment and Development (UNCED) in 1992, where, amongst numerous commitments, the Conference called upon governments to develop national strategies for sustainable development, incorporating policy measures outlined in the Rio Declaration and Agenda 21.[29]

It is further observed that despite the efforts of many governments around the world to implement such strategies as well as international cooperation to support national governments, there are continuing concerns over global economic and environmental developments in many countries which have been intensified by recent prolonged global energy, food and financial crises, and underscored by continued warnings from global scientists that society is in danger of transgressing a number of planetary boundaries or ecological

[28] See generally, Laura J Shepherd, *Critical Approaches to Security: An Introduction to Theories and Methods* (Routledge 2013).

[29] United Nations Department of Economic and Social Affairs (UNDESA), *A guidebook to the Green Economy, Issue 1: Green Economy, Green Growth, and Low-Carbon Development - history, definitions and a guide to recent publications, UN-DESA*, August 2012, available at http://www.uncsd2012.org/index.php?page=view&type=400&nr=528&menu=45 [Accessed on 06/05/2022].

limits.[30] Environmental security is thus one of the key elements of the sustainable development agenda. This special relationship has been in a number of initiatives and plans of action as reflected in the highlighted instruments under this section.

3.1 Agenda 21

Agenda 21[31] is part of the global efforts aimed to address the pressing problems of today and also aims at preparing the world for the challenges of the next century. It reflects a global consensus and political commitment at the highest level on development and environment cooperation.[32] Chapter 9 of the Agenda 21 is dedicated to measures aimed at protection of the atmosphere. The options and measures described in the chapter are recommended for consideration and, as appropriate, implementation by Governments and other bodies in their efforts to protect the atmosphere.[33] Specifically, the chapter is dedicated to the following areas: addressing the uncertainties: improving the scientific basis for decision-making; promoting sustainable development: energy development, efficiency and consumption; transportation; industrial development; terrestrial and marine resource development and land use; preventing stratospheric ozone depletion; and transboundary atmospheric pollution.[34] As part of the efforts towards ensuring environmentally sound atmosphere, states are to take diverse measures, some of which are suggested in the document, that address the threats that contribute to depreciating atmospheric conditions. The suggestions are cross-cutting and aimed at addressing threats that may emanate from various sectors of the economy.

[30] Ibid.
[31] United Nations, United Nations Conference on Environment & Development, Rio de Janeiro, Brazil, 3 to 14 June 1992, Agenda 21.
[32] Ibid, Preamble.
[33] Ibid, para. 9.1.
[34] Ibid, para. 9.5.

3.2 1992 United Nations Framework Convention on Climate Change

The 1992 United Nations Framework Convention on Climate Change[35] which is an intergovernmental treaty developed to address the problem of climate change, setting out an agreed framework for dealing with the issue, was negotiated from February 1991 to May 1992 and opened for signature at the June 1992 UN Conference on Environment and Development (UNCED) — also known as the Rio Earth Summit.[36]

By 1995, countries realized that emission reductions provisions in the Convention were inadequate. They launched negotiations to strengthen the global response to climate change, and, two years later, adopted the Kyoto Protocol. The Kyoto Protocol legally binds developed countries to emission reduction targets. The Protocol's first commitment period started in 2008 and ended in 2012. The second commitment period began on 1 January 2013 and was designed to end in 2020.[37]

Parties to the Convention continue to meet regularly to take stock of progress in implementing their obligations under the treaty, and to consider further actions to address the climate change threat.[38]

These provisions are expected to inform the national policy and legal framework for environmental security for the current and future generations especially in the area of climate change mitigation.

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[35] UN General Assembly, *United Nations Framework Convention on Climate Change: resolution / adopted by the General Assembly*, 20 January 1994, A/RES/48/189.

[36] International Institute for Sustainable Development – Reporting Services Division, "Climate and Atmosphere: Introduction to the UNFCCC and Kyoto Protocol," available at http://www.iisd.ca/process/climate_atm-fcccintro.htm [Accessed on 06/05/2022].

[37] United Nations Framework Convention on Climate Change, *Background on the UNFCCC: The international response to climate change*, available at http://unfccc.int/essential_background/items/6031.php [Accessed on 06/05/2022].

[38] International Institute for Sustainable Development – Reporting Services Division, "Climate and Atmosphere: Introduction to the UNFCCC and Kyoto Protocol," *op cit.*

3.3 Ramsar Convention (1973)

The Ramsar Convention[39] is an intergovernmental treaty whose mission is conservation and wise use of all wetlands through local, regional and national actions and international cooperation, as a contribution towards achieving sustainable development throughout the world. [40] It is the overarching international legal instrument that should inform state parties' legal framework on wetlands conservation and use.

Wetlands play an important role in ensuring environmental stability and health and thus, this Convention is important in helping countries come up with measures on how to counter impending threats to these resources. As reservoirs for water and nutrients, wetlands serve human beings, animals and plants.

It therefore, follows that improved health of the wetland resources can go a long way in achieving environmental health and security for both anthropocentric and ecocentric reasons.

3.4 Convention on Biological Diversity

The Convention on Biological Diversity[41] was negotiated with the objective of promoting conservation of biodiversity, the sustainable use of its components, and the fair and equitable sharing of benefits arising out of the utilization of genetic resources.[42] Amongst the most relevant provisions of the Convention are Articles 6 and 7.

Article 6 provides that each Contracting Party should, in accordance with its particular conditions and capabilities: develop national strategies, plans or programmes for the conservation and sustainable use of biological diversity or adapt for this purpose existing strategies, plans or programmes which

[39] Convention on Wetlands of International Importance especially as Waterfowl Habitat, 996 UNTS 245; TIAS 11084; 11 ILM 963 (1972).
[40] Ramsar Convention Secretariat, 2013. *The Ramsar Convention Manual: a guide to the Convention on Wetlands* (Ramsar, Iran, 1971), 6th ed. Ramsar Convention Secretariat, Gland, Switzerland.
[41] 1992 Convention on Biological Diversity, [1993] ATS 32 / 1760 UNTS 79 / 31 ILM 818 (1992).
[42] Art. 1.

should reflect, inter alia, the measures set out in the Convention relevant to the Contracting Party concerned; and integrate, as far as possible and as appropriate, the conservation and sustainable use of biological diversity into relevant sectoral or cross-sectoral plans, programmes and policies. An integrated approach to conservation and sustainable use of biological diversity holds a key to ensuring that all the relevant stakeholders in member states get to work together to achieve biological resource conservation and restoration. With such guidelines as provided by the Convention, it is possible for the international community to collaborate in biological diversity conservation and use, especially in the case of transboundary resources.

Article 7 states that each Contracting Party should identify components of biological diversity important for its conservation and sustainable use, and monitor those components, particularly those requiring urgent conservation measures and those which offer the greatest potential for sustainable use. They should also identify and monitor processes and activities likely to have significant adverse impacts on the conservation and sustainable use of biological diversity, and maintain and organise data derived from monitoring. In identifying such components, states are able to ensure the conservation and sustainable use of those resources. However, for them to do so, they ought to bring on board all the relevant stakeholders, namely, communities, scientists, and regulators, amongst others to make the work easier and comprehensive. International cooperation in such projects is also important for purposes of sharing scientific knowledge and research outcome. The net effect would be enhanced environmental security, not only for the good of the concerned people but also for improved environmental health.

3.5 Convention on the Law of the Non-Navigational Uses of International Watercourses, 1997

The Convention on the Non-Navigational Use of Watercourses[43] applies to uses of international watercourses and of their waters for purposes other than

[43] Adopted by the General Assembly of the United Nations on 21 May 1997. Entered into force on 17 August 2014. See General Assembly resolution 51/229, annex,

navigation and to measures of protection, preservation and management related to the uses of those watercourses and their waters.[44] There is an obligation under the Convention for the Watercourse States to, in utilizing an international watercourse in their territories, take all appropriate measures to prevent the causing of significant harm to other watercourse States.[45] There is also a general obligation for the Watercourse States to cooperate on the basis of sovereign equality, territorial integrity, mutual benefit and good faith in order to attain optimal utilization and adequate protection of an international watercourse.[46]

It is important to recognise the need for joint efforts in conserving and protecting international watercourses since any negative effects would also be transnational and would affect different states. Although the Convention does not have binding effect on the parties, it provides a good framework within which parties can collaborate in ensuring environmental health of the international watercourses.

3.6 The Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests (Forest Principles)

The Forest Principles[47] state in the preamble that the subject of forests is related to the entire range of environmental and development issues and opportunities, including the right to socio-economic development on a sustainable basis. They also provide that the guiding objective of these principles is to contribute to the management, conservation and sustainable development of forests and to provide for their multiple and complementary functions and uses.[48] They also acknowledge that forestry issues and opportunities should be examined in a holistic and balanced manner within the overall context of environment and development, taking into

Official Records of the General Assembly, Fifty-first Session, Supplement No. 49 (A/51/49).
[44] Art. 1.1.
[45] Art. 7.1.
[46] Art. 8.1.
[47] A/CONF.151/26 (Vol. III).
[48] Preamble.

consideration the multiple functions and uses of forests, including traditional uses, and the likely economic and social stress when these uses are constrained or restricted, as well as the potential for development that sustainable forest management can offer.[49]

The Principles require countries to ensure that forest resources and forest lands are sustainably managed to meet the social, economic, ecological, cultural and spiritual needs of present and future generations. These needs are for forest products and services, such as wood and wood products, water, food, fodder, medicine, fuel, shelter, employment, recreation, habitats for wildlife, landscape diversity, carbon sinks and reservoirs, and for other forest products. They state that appropriate measures should be taken to protect forests against harmful effects of pollution, including air-borne pollution, fires, pests and diseases, in order to maintain their full multiple value.[50]

Notably, the Principles state that the vital role of all types of forests in maintaining the ecological processes and balance at the local, national, regional and global levels through, inter alia, their role in protecting fragile ecosystems, watersheds and freshwater resources and as rich storehouses of biodiversity and biological resources and sources of genetic material for biotechnology products, as well as photosynthesis, should be recognized.[51]

The Principles also provide that national forest policies should recognize and duly support the identity, culture and the rights of indigenous people, their communities and other communities and forest dwellers. Further, appropriate conditions should be promoted for these groups to enable them to have an economic stake in forest use, perform economic activities, and achieve and maintain cultural identity and social organization, as well as adequate levels of livelihood and well-being, through, inter alia, those land tenure arrangements which serve as incentives for the sustainable management of forests.[52]

[49] Preamble.
[50] Principle 2 (b).
[51] Principle 4.
[52] Principle 5 (a).

The forests principles though non-legally binding, provide minimum guidelines on the efficient management, conservation and sustainable utilisation of forest resources for the current and future generations. Owing to their many uses, forest conservation and protection is important for the realisation of a healthy environment.

3.7 Sustainable Development Goals (SDGs)

At the United Nations Sustainable Development Summit on 25 September 2015, world leaders adopted the 2030 Agenda for Sustainable Development, which includes a set of 17 Sustainable Development Goals (SDGs) to end poverty, fight inequality and injustice, and tackle climate change by 2030.[53] According to the United Nations Development Programme (UNDP), the Sustainable Development Goals, otherwise known as the Global Goals, build on the Millennium Development Goals (MDGs), eight anti-poverty targets that the world committed to achieving by 2015.[54] The MDGs, adopted in 2000, aimed at an array of issues that included slashing poverty, hunger, disease, gender inequality, and access to water and sanitation. The new SDGs, and the broader sustainability agenda, go much further than the MDGs, addressing the root causes of poverty and the universal need for development that works for all people.[55]

In order to end hunger, achieve food security and improved nutrition and promote sustainable agriculture, the SDGs aim to ensure that by 2030, countries double the agricultural productivity and incomes of small-scale food producers, in particular women, indigenous peoples, family farmers, pastoralists and fishers, including through secure and equal access to land, other productive resources and inputs, knowledge, financial services, markets and opportunities for value addition and non-farm employment.[56]

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[53] United Nations Development Programme, 'Sustainable Development Goals (SDGs),'
available at http://www.undp.org/content/undp/en/home/mdgoverview/post-2015-development-agenda.html[Accessed on 06/05/2022].
[54] Ibid.
[55] Ibid.
[56] Goal 2.3.

They also provide that by 2030, countries should ensure sustainable food production systems and implement resilient agricultural practices that increase productivity and production, that help maintain ecosystems, that strengthen capacity for adaptation to climate change, extreme weather, drought, flooding and other disasters and that progressively improve land and soil quality.[57]

Further, by 2020, countries are to maintain the genetic diversity of seeds, cultivated plants and farmed and domesticated animals and their related wild species, including through soundly managed and diversified seed and plant banks at the national, regional and international levels, and promote access to and fair and equitable sharing of benefits arising from the utilization of genetic resources and associated traditional knowledge, as internationally agreed.[58]

In summary, the Sustainable Development Goals seeks to, inter alia, end poverty in all its forms everywhere; end hunger, achieve food security and improved nutrition and promote sustainable agriculture; ensure healthy lives and promote well-being for all at all ages; ensure inclusive and equitable quality education and promote lifelong learning opportunities for all; achieve gender equality and empower all women and girls; ensure availability and sustainable management of water and sanitation for all; ensure access to affordable, reliable, sustainable and modern energy for all; promote sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all; build resilient infrastructure, promote inclusive and sustainable industrialization and foster innovation; reduce inequality within and among countries; make cities and human settlements inclusive, safe, resilient and sustainable; ensure sustainable consumption and production patterns; take urgent action to combat climate change and its impacts; conserve and sustainably use the oceans, seas and marine resources for sustainable development; protect, restore and promote sustainable use of terrestrial ecosystems, sustainably manage forests, combat desertification, and halt and reverse land degradation and halt biodiversity loss; promote peaceful and inclusive societies for sustainable development, provide access

[57] Goal 2.4.
[58] Goal 2.5.

to justice for all and build effective, accountable and inclusive institutions at all levels; and strengthen the means of implementation and revitalize the Global Partnership for Sustainable Development.

The SDGs ought to inform the efforts of member states in achieving sustainable development, poverty eradication, and environmental conservation and protection. They offer an integrated approach, which is environmentally conscious, to combating the various problems that affect the human society as well as the environmental resources. It is expected that states efforts will be informed by the SDGs in the economic, social, political and environmental decisions. The Goals also provide an elaborate standard for holding countries accountable in their development activities. This way, environmental health is not likely to be sacrificed at the altar of economic development but will be part of the development agenda.

The 2030 Agenda for Sustainable Development[59] is a plan of action for people, planet and prosperity. It also seeks to strengthen universal peace in larger freedom and was formulated in recognition that eradicating poverty in all its forms and dimensions, including extreme poverty, is the greatest global challenge and an indispensable requirement for sustainable development.[60] With regard to planet sustainability, the State parties agreed to protect the planet from degradation, including through sustainable consumption and production, sustainably managing its natural resources and taking urgent action on climate change, so that it can support the needs of the present and future generations.[61] Concerning peace sustainability, the Agenda states that countries are determined to foster peaceful, just and inclusive societies which are free from fear and violence. There can be no sustainable development without peace and no peace without sustainable development.[62] Going by this assertion, environmental security becomes an indispensable part of sustainable development.

[59]Resolution adopted by the General Assembly on 25 September 2015, [without reference to a Main Committee (A/70/L.1)], Seventieth session, Agenda items 15 and 116, 21 October 2015.
[60] Ibid, Preamble.
[61] Ibid, Preamble.
[62] Ibid, Preamble.

The participants also resolved, between 2015 and 2030, to end poverty and hunger everywhere; to combat inequalities within and among countries; to build peaceful, just and inclusive societies; to protect human rights and promote gender equality and the empowerment of women and girls; and to ensure the lasting protection of the planet and its natural resources. They resolved also to create conditions for sustainable, inclusive and sustained economic growth, shared prosperity and decent work for all, taking into account different levels of national development and capacities.[63]

The Agenda also envisages a world in which every country enjoys sustained, inclusive and sustainable economic growth and decent work for all. A world in which consumption and production patterns and use of all natural resources – from air to land, from rivers, lakes and aquifers to oceans and seas – are sustainable; One in which democracy, good governance and the rule of law, as well as an enabling environment at the national and international levels, are essential for sustainable development, including sustained and inclusive economic growth, social development, environmental protection and the eradication of poverty and hunger; One in which development and the application of technology are climate-sensitive, respect biodiversity and are resilient and one in which humanity lives in harmony with nature and in which wildlife and other living species are protected.[64]

Through full implementation of the goals and principles set out in the Agenda, it is possible to achieve a clean and healthy environment both for the sake of a secure future for the human beings and the wildlife and other living species. It incorporates both anthropocentric and ecocentric approaches to environmental conservation and protection, since it seeks to protect both the humans and the planet as a whole.

[63] Ibid, Agenda No. 3.
[64] Ibid, Agenda No. 9.

3.8 United Nations Conference on Sustainable Development, Rio+20

The United Nations Conference on Sustainable Development - or Rio+20 - took place in Rio de Janeiro, Brazil on 20-22 June 2012.It resulted in a focused political outcome document[65] which contains clear and practical measures for implementing sustainable development.[66]

The document was as a result of recognition of the fact that poverty eradication, changing unsustainable and promoting sustainable patterns of consumption and production and protecting and managing the natural resource base of economic and social development are the overarching objectives of and essential requirements for sustainable development. The participants also reaffirmed the need to achieve sustainable development by promoting sustained, inclusive and equitable economic growth, creating greater opportunities for all, reducing inequalities, raising basic standards of living, fostering equitable social development and inclusion, and promoting the integrated and sustainable management of natural resources and ecosystems that supports, inter alia, economic, social and human development while facilitating ecosystem conservation, regeneration and restoration and resilience in the face of new and emerging challenges.[67]

The Conference and the resultant document were for purposes of achieving sustainable development. All that is required now is political goodwill from the state parties to ensure that their national frameworks and efforts towards sustainable development are in line with the spirit of Rio+20 as a way of guaranteeing sustainable production, consumption and conservation of the environmental resources for both the present and future generations. By ensuring that everyone is on board and meaningfully engaged, the hope for a sustainably developed world becomes realizable for all. All the foregoing international efforts are supposed to be adopted by states and to also reflect in their domestic efforts towards environmental conservation and

[65] United Nations, *Future We Want - Outcome document*, Resolution adopted by the General Assembly on 27 July 2012[without reference to a Main Committee (A/66/L.56)], A/RES/66/288.
[66] United Nations Department of Economic and Social Affairs, 'United Nations Conference on Sustainable Development, Rio+20,' available at https://sustainabledevelopment.un.org/rio20 [Accessed on 06/05/2022].
[67] Clause 4.

management for realisation of sustainable development agenda. The next section looks at some of Kenya's initiatives and framework on realisation of environmental rights and especially environmental security for the people of Kenya.

4. Efforts towards Environmental Security in Kenya

There have been various efforts by the Kenyan authorities to ensure that the environment is secure both for the current generation and the future generations, as required under the international legal instruments on environment and development. The country has been grappling with such issues as climate change, environmental degradation, pollution and deforestation, amongst others. To address these issues, a number of measures, legal, policy and institutional, have been put in place.

4.1 Constitution of Kenya 2010 and Environmental Security

The preamble to the Constitution of Kenya recognises the importance of the environment and therefore calls for its respect, being the heritage of the Kenyan people, and also requires its sustenance for the benefit of future generations.[68] Also noteworthy is the provision that sustainable development is one of the national values and principles of governance, which must bind all State organs, State officers, public officers and all persons whenever any of them: applies or interprets the Constitution; enacts, applies or interprets any law; or makes or implements public policy decisions.[69] This is especially important in environmental and natural resource management matters.

The Constitution also has a whole chapter dedicated to land and environmental related matters.[70] The Constitution provides that every person has the right to a clean and healthy environment, which includes the right: to have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 69[71]; and to have obligations relating to the

[68] Preamble, Constitution of Kenya, (Government Printer, 2010).
[69] Art. 10.
[70] Arts. 60-72.
[71] Article 69 (1) provides for State and individual obligations in respect of the environment. It requires the State to, inter alia: ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources,

environment fulfilled under Article 70.[72] In a bid to ensure sustainability and safeguard land-related resources, the Constitution provides that land in Kenya should be held, used and managed in a manner that is equitable, efficient, productive and sustainable, and in accordance with the following principles: equitable access to land; security of land rights; sustainable and productive management of land resources; transparent and cost effective administration of land; sound conservation and protection of ecologically sensitive areas; elimination of gender discrimination in law, customs and practices related to land and property in land; and encouragement of communities to settle land disputes through recognised local community initiatives consistent with the Constitution.[73] These principles may be construed as ones meant to ensure that even as communities derive their livelihoods from land and land-related resources, they do so in a sustainable manner. Sustainable rural livelihood has been defined as *a livelihood comprises the capabilities, assets (stores, resources, claims and access) and activities required for a means of living: a livelihood is sustainable which can cope with and recover from stress and shocks, maintain or enhance its capabilities and assets, and provide sustainable livelihood opportunities for the next generation; and which contributes net benefits to other livelihoods at the local and global levels and in the short and long-term* (emphasis added).[74]

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and ensure the equitable sharing of the accruing benefits; work to achieve and maintain a tree cover of at least ten per cent of the land area of Kenya; encourage public participation in the management, protection and conservation of the environment; protect genetic resources and biological diversity; establish systems of environmental impact assessment, environmental audit and monitoring of the environment; eliminate processes and activities that are likely to endanger the environment; and utilise the environment and natural resources for the benefit of the people of Kenya; Art. 70 (1) provides that if a person alleges that a right to a clean and healthy environment recognised and protected under Article 42 has been, is being or is likely to be, denied, violated, infringed or threatened, the person may apply to a court for redress in addition to any other legal remedies that are available in respect to the same matter.

[72] Art. 42.

[73] Art. 60(1).

[74] L. Krantz, *The Sustainable Livelihood Approach to Poverty Reduction: An Introduction*, (Swedish International Development Cooperation Agency, February, 2001), p.6,

With regard to economic and social rights, the Constitution provides that every person has the right: to the highest attainable standard of health, which includes the right to health care services, including reproductive health care; to accessible and adequate housing, and to reasonable standards of sanitation; to be free from hunger, and to have adequate food of acceptable quality; to clean and safe water in adequate quantities; to social security; and to education.[75]

It is noteworthy that the provision of most of the economic and social rights as guaranteed in the Constitution is dependent on the state of the environment. [76] It has been argued that full environmental security is

available at http://www.sida.se/contentassets/bd474c210163447c9a7963d77c64148a/the-sustainable-livelihood-approach-to-poverty-reduction_2656.pdf [Accessed on 16/10/2015]; cf, 'Chapter 2: The Theory Behind the Sustainable Livelihood Approach,' in S. Morse & N. McNamara, *Sustainable Livelihood Approach: A Critique of Theory and Practice*, (Springer Science+Business Media Dordrecht, 2013), pp. 15-60. S. Morse and N. McNamara observe that, sustainable livelihood approach evolved within the context of the intentional development approach by which development practitioners were seeking to maximise the effectiveness of their interventions to help the disadvantaged. It is in effect a diagnostic tool which provides a framework for analysis leading to concrete suggestions for intervention. It was typically applied in poorer countries as part of a planning phase for an intervention via policy, a development project or perhaps as the basis for more in-depth research. In that sense the sustainable livelihood approach is an analysis of peoples' current livelihood and what is needed for an 'enhancement', and useful in avoiding the inappropriate interventions critiqued by the post-developmentalists. They however argue that it should be noted that the latter might not necessarily be the need for people to replace their current livelihood or indeed have more means of livelihood. Instead it might involve making the current means of livelihood less susceptible to environmental, social or economic 'stresses'. The sustainable livelihood approach could also result in recommendations that people themselves may be able to put into practice rather than be dependent upon the actions of outsiders. According to them, therefore, it is thus a 'no holds barred' approach to understanding and improving the sustainability of livelihood, although it clearly has to take into account what is feasible in different circumstances (p. 17-18). The import of this, in the Kenyan context, would be that various regions require different approaches to achieve environmental security and overall development for the people.

[75] Art. 43(1).

[76] See generally, A. Boyle, "Human Rights and the Environment: A Reassessment," *Boyle UNEP Paper Revised*, available at

achieved when the natural resources provide full environmental services to the human beings who depend on this area and when this condition is sustainable. [77] This demonstrates the close relationship between environmental security and sustainable development. A healthy environment that supports the needs of communities, with natural ability for replenishment means that there is enough for everyone and a similar guarantee for future generations. A satisfied society is able to co-exist peacefully.

To establish the relationship between environmental security and sustainable development, the Food and Agricultural Organisation defines sustainable development by specifying the features of sustainable development thus: *resource use and environmental management are combined with increased and sustained production, secure livelihoods, food security, equity, social stability, and people's participation in the development process (*emphasis added).[78] As such, it is arguable that for a country to achieve sustainable development, all the foregoing elements, including environmental security concerns, must be addressed. This is due to the fact that any external shock to the environment such as deforestation makes the local people, especially the rural households, environmentally and economically vulnerable in securing their livelihood.[79] It has been argued that poverty eradication contains four ingredients which include: food and nutritional security; income security; social security; and human security.[80] For poverty to be fully eradicated, these elements must adequately be addressed.

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[77]F. W. T. P., Vries, *et al*, "Integrated Land and Water Management for Food and Environmental Security," *Integrated land and water management for food and environmental security*, (Comprehensive Assessment of Water Management in Agriculture Research Report 1, 2003), p. 54. Available at http://www.unep.org/environmentalgovernance/Portals/8/documents/Events/HumanRightsEnvironmentRev.pdf [Accessed on 06/05/2022]. http://www.gwp.org/Global/ToolBox/References/Integrated%20land%20and%20water%20management%20for%20food%20and%20environmental%20security%20%28IWMI,%202003%29.pdf [Accessed on 06/05/2022].

[78]S.S. Shrestha & P.B. Bhandari, "Environmental Security and Labor Migration in Nepal," *op cit*, p. 4.

[79] Ibid, p. 1.

[80] R. Das, *Poverty and Hunger: Causes and Consequences*, (Sarup & Sons, 2006), p. 8.

A number of these ingredients are so closely related to environmental security, that an environmentally insecure environment compromises the realisation of a poverty-free society. A population that is food insecure and poorly equipped concerning agriculture production is desperate to survive, and this is often at the expense of environmental sustainability since they engage in unsustainable agricultural practices.[81] It has rightly been observed that impoverished people feel driven by their plight to overwork their croplands, to clear forests and to cultivate drylands and mountain slopes for additional croplands, all of which trigger soil erosion and other environmental ills, and result in poverty compounded. [82] In such an environment, sustainable development becomes a mirage.[83] Nevertheless, it has been observed that rapidly increasing population in the dynamic semi-arid agro-ecosystems in sub-Saharan Africa (SSA) highlights the necessity to increase food production, while at the same time safe-guarding other ecological systems that support human development and well-being.[84]

From the foregoing, it is arguable that the full implementation of the Bill of Rights largely depends on the state of the environment, especially in relation to the social and economic rights of the people. A clean and healthy environment that is secure is central for the implementation and enforcement of the right to: the highest attainable standard of health; accessible and adequate housing, and to reasonable standards of sanitation; to be free from hunger, and to have adequate food of acceptable quality; to clean and safe water in adequate quantities; and to social security. [85] Environmental degradation negatively affects the ability of a State to feed its people, provide clean and safe drinking water in adequate quantities, and attain right to health

[81] K. Muigua, "Food Security and Environmental Sustainability in Kenya," p.4, available at http://www.kmco.co.ke/attachments/article/129/FOOD%20SECURITY%20AND%20ENVIRONMENTAL%20SUSTAINABILITY%20IN%20KENYA.pdf
[82] N. Myers, "Environmental Security: What's New and Different?" pp. 3-4.
[83] Boyce JK, 'Is Inequality Bad for the Environment?' (200m7) 15 Research in Social Problems and Public Policy 267; See also Hoffman AJ and Sandelands LE, 'Getting Right with Nature' (2005) 18 Organization & Environment 141.
[84] Smallholder System Innovations in Integrated Watershed Management (SSI), *Strategies of Water for Food and Environmental Security in Drought-Prone Tropical and Subtropical Agro-Ecosystems*,p. vii.
[85] Art. 43.

and reasonable standards of sanitation, amongst others. Any meaningful implementation of the constitutional Bill of Rights should therefore start with the realisation of an environmentally secure society for all.

While the Constitution makes provisions for the protected rights as well as the guiding principles in realisation of various rights, there have been other efforts by different state entities to actualize the guaranteed rights as well as meeting the state's international obligations. The next subsection offers an overview of some of the relevant measures.

4.2 Related Legal, Policy and Institutional Measures on Achieving Environmental Security in Kenya

The *REDD+ Concept Note: Dryland Forest Conservation*[86] records that the Government of Kenya has a REDD+ Coordination Office and National REDD+ Technical Working Group in place, developed a REDD readiness preparation proposal (RPP) and is working toward a national REDD+ strategy.[87] The REDD+ actions are consistent with the goal of Kenya's constitution that sets a target of 10 percent tree cover, up from the current six percent. These actions are also consistent with *Kenya Vision 2030*, the long-term development blueprint for the country.[88] The actions are also aimed at restoring dryland forests for sustainable development.[89] This can go a long way in attaining environmental security in the arid and semi-arid regions in the country. However, there should be taken realizable steps, in collaboration with the locals, to ensure the Government projections are realized for environmental security especially in the arid and semi-arid areas in the country.

As part of an analysis of low-carbon development options in Kenya, which covers the six mitigation sectors set out in Article 4.1 of the United Nations Framework Convention on Climate Change (UNFCCC) (energy, transport, industry, waste, forestry and agriculture), Kenya has made attempts to move

[86] D. Murphy & S. McFatridge, *REDD+ Concept Note: Dryland Forest Conservation*, (IISD, 2012).
[87] Ibid, p. 1.
[88] Ibid, p.1.
[89] Ibid, pp. 3-4.

away from over-reliance on energy sources that increase greenhouse gas emissions.[90] The country aims at diversifying energy sources for the growing energy needs in the country, while reducing environmental impact for sustainability.[91] This is a laudable step considering that wood fuel greatly affects reforestation and afforestation efforts. Diversified energy sources can boost the drive towards achieving at least ten percent forest cover in the country.

It has been observed that Kenya is experiencing rapid growth in the generation of solid waste, and appropriate systems for waste collection, management and disposal are a cornerstone for development as they significantly contribute to cleanliness and health in human settlements.[92] However, while solid waste collection, management and disposal has improved over the past years, it still poses a challenge in Kenya, since according to the Kenya National Environment Management Authority (NEMA), only 40 percent of waste generated in urban centres is collected and disposed of at designated disposal sites.[93] Further, the provision of adequate sanitary facilities in urban areas in the face of growing population, especially sewage disposal, poses another challenge.[94]

To address the problem, the Government aims to adopt several Pollution and Solid Waste Management strategies have been identified to deliver on short- and long-term goals which include: develop and enforce mechanisms targeting pollution and solid waste management regulations; public-private partnerships for municipal waste; reduce importation of oil with high sulphur content; establish a national air quality monitoring system; and apply market-oriented instruments to regulate the use of plastic bags.[95]

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[90] L. Cameron, et al, *National Climate Change Action Plan: Mitigation*, 'Chapter 5: Electricity Generation,' (Government of Kenya, August 2012), p. 1.
[91] Ibid.
[92] L. Cameron, et al, *National Climate Change Action Plan: Mitigation*, 'Chapter 9: Waste,' (Government of Kenya, August 2012), p. 1.
[93] Ibid.
[94] Ibid.
[95] Ibid, p. 3.

It is important to point out that while pollution is a major contributing factor to environmental degradation, pollution and solid waste management strategies will require to be backed by creating environmental awareness to curb further corruption by the local people. Pollution of water, air and other land-based resources does not come from the urban centres only but also from unstainable agricultural and production methods among the people. These ought to be dealt with through ensuring a collaborative approach to pollution control and eliminations. For instance, through encouraging the communities to plant more trees and to employ sustainable production methods, atmospheric pollution is greatly reduced through reduced greenhouse gases elimination. Communities are also able to employ precautionary approach in their interaction with the environment. An environmentally-conscious community makes it easier to bring polluters to book. Thus, the foregoing government plans should as much as possible include the people who are most affected so as to make them appreciate the implications of such efforts and consequently give them social approval.

5. Call for Action: Moving Beyond the Law

As far as production and use of renewable natural resources is concerned, it has rightly been asserted that all utilisation of the renewable natural resources must be carried out on a sustained-yield basis; and all disposal of wastes (gaseous, liquid and solid) must be carried out on a sustained-discard basis, that is, at disposal rates not in excess of decomposition rates.[96] While it is difficult to establish such rates, the solution may lie in moving away from the increased use of synthetic waste and other non-decomposing wastes to the easily decomposing technology waste. For instance, in agriculture, it is imperative that the country adopts methods and technology that is friendlier to green economy practices as opposed to the polluting and dangerous chemicals.[97] It is contended that without an inflexible commitment to the sustainable development of resources and the sustainable disposal of wastes there can be no environmental security.[98] This is true

[96] A.H. Westing, "Environmental Security and Its Relation to Ethiopia and Sudan," *Ambio*, Vol. 20, No. 5, Environmental Security (Aug., 1991), pp. 168-171, p. 168.
[97] See Government of Kenya, *Kenya Green Economy Strategy and Implementation Plan (GESIP)*, Maanzoni-1 Draft, May 2015.
[98] Ibid.

considering that unstainable use of resources coupled with unsustainable waste disposal negatively affects the environment and ultimately the quality of life for human beings, plants as well as animals.

It is important that the country integrates both anthropocentric and ecocentric approaches to environmental conservation and protection. This will ensure that the environment is not only secure for the sake of satisfying human needs, but also ensuring that it is healthy for the animals and plants.[99] This approach is envisaged in the Earth Charter[100] which calls for respect for the Earth and life in all its diversity in recognition of the fact that all beings are interdependent and every form of life has value regardless of its worth to human beings.[101] For instance, without the bees, pollination of plants would be almost impossible, and without plants animal lives would be jeopardized. A sustained and secure environment is also useful for the regeneration of resources. The Charter calls for rights with responsibilities and states that there should be care for the community of life with understanding, compassion, and love. It provides that all must accept that with the right to own, manage, and use natural resources comes the duty to prevent environmental harm and to protect the rights of people.[102] A fundamental purpose of the Earth Charter is to encourage all peoples to identify with the whole Earth community as well as their local communities and to expand their moral concern and caring to include the present and future well-being of the entire human family and the larger living world.[103]

Kenya asserts that it has shown commitment to protect the climate system for the benefit of the present and future generations by supporting the United Nations Framework Convention on Climate Change (UNFCCC) process; ratifying the Kyoto Protocol in 2005; and contributing to continental and

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[99] See generally, Oksanen M, 'Should Trees Have Standing? Law, Morality, and the Environment' 174.
[100] UN General Assembly, *World Charter for Nature*, 28 October 1982, A/RES/37/7.
[101] Principle 1.
[102] Principle 2.
[103]S.C. Rockefeller, *The Earth Charter*, p. 4, available at http://users.clas.ufl.edu/bron/pdf--christianity/Rockefeller--Earth%20Charter.pdf [Accessed on 06/05/2022].

regional climate change initiatives.[104] Kenya has also enacted the, *Climate Change Act2016*, which seeks, inter alia, to provide- a framework for mitigating and adapting to the effects of climate change on all sectors of the economy and levels of governance; a mechanism for coordination and governance of matters relating to climate change; coordination mechanism for formulation of programmes and plans to enhance the resilience of human and ecological systems against the impacts of climate change; for mainstreaming of the principle of sustainable development in the planning for and on climate change response strategies and actions; for promotion of social and economic measures in climate change responses to support sustainable human development; and a mechanism for coordination of measuring , verification and reporting of climate interventions.[105]

This, it is argued, is complemented by the fact that the country's Constitution has set out a legal commitment to attain ecologically sustainable development; hence providing a basis to address the challenge of climate change while striving to attain its development goals through the Kenya Vision 2030.[106]

There is, however, a need to take more action directed at addressing the challenges facing realisation of environmental security in the country. Although the international framework on environmental law has comprehensive and well-meaning provisions and principles that may help countries address environmental insecurity, most of them are merely prescriptive in nature without any force of law. As such they heavily rely on the countries' political goodwill.[107] It is undeniable that Kenya has done a lot to domesticate the provisions of the international legal instruments but more

[104] Ministry Of Environment, Water and Natural Resources, Draft National Climate Change Framework Policy (Version of 22 September, 2014), *Sessional Paper No. ** of 2014 on National Climate Change Framework Policy*, p. 4 (Government Printer, Nairobi, 2014).
[105] Climate Change Act, No. 11 of 2016, S 3 (2), (Government Printer, Nairobi, 2016).
[106] Ministry Of Environment, Water and Natural Resources, Draft National Climate Change Framework Policy (Version of 22 September, 2014).
[107] See generally, Lang W, 'UN-Principles and International Environmental Law' (1999) 163 Max Planck UNYB 157.

still needs to be done by way of implementing the same. The response to climate change in Kenya must adhere to the constitutional governance framework and commitment to sustainable development, while addressing the goal of attaining low carbon climate resilient development.

The State entities need to closely work with communities, private sector and various stakeholders to promote and ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources. Indeed, the recent announcement by the Environment cabinet Secretary, who called for new stakeholder partnerships to address challenges facing the community based natural resources management, is to be lauded. The cabinet Secretary noted that over-exploitation of natural resources, limited access to markets; poverty and weak policies were rampant in areas endowed with community resources posing challenges in their exploitation. According to the Secretary, the Ministry was committed to support community-based environmental initiatives that recognize equity, fair-trade and benefits sharing of natural resource management.[108]

The United Nations Conference on Sustainable Development, Rio+20 conference participants recognized that farmers, including small-scale farmers and fisherfolk, pastoralists and foresters, can make important contributions to sustainable development through production activities that are environmentally sound, enhance food security and the livelihood of the poor and invigorate production and sustained economic growth.[109] Such an approach that integrates the efforts of the locals can a go a long way in guaranteeing sustainability since they also act as incentives for the communities to shun unsustainable methods of production and utilisation of resources. It would also play a big and positive role in ensuring that there is equitable sharing of the accruing benefits.[110]

[108] Ministry of Environment and Natural Resources, 'Ministry to Support Community Initiatives,' available at http://www.environment.go.ke/?p=1467 [Accessed on 06/05/2022].
[109] United Nations Conference on Sustainable Development, Rio+20, Clause 52.
[110] The Natural Resources (Benefit Sharing) Bill, 2020 contemplates public and community participation in benefits sharing.

In promoting sustainable agriculture and rural development, Agenda 21 provides that major adjustments are needed in agricultural, environmental and macroeconomic policy, at both national and international levels, in developed as well as developing countries, to create the conditions for Sustainable Agriculture and Rural Development (SARD). The major objective of SARD is to increase food production in a sustainable way and enhance food security. This will involve education initiatives, utilization of economic incentives and the development of appropriate and new technologies, thus ensuring stable supplies of nutritionally adequate food, access to those supplies by vulnerable groups, and production for markets; employment and income generation to alleviate poverty; and natural resource management and environmental protection.[111]

In areas where communities largely depend on agriculture for livelihood, there is need to create awareness for the diversification of economic activities, and effective agriculture and production methods. Communities, especially those living in ecologically susceptible areas need to be encouraged to engage in economically viable but environmentally friendly activities. Those that rely exclusively on livestock keeping should be supported to come up with efficient but sustainable production methods that will ensure higher yields while conserving the environment. They should be engaged in planting and nurturing dryland forests which will not only help in environmental restoration but also ensure there will be enough resources for their use.

The Ministry of Environment and Natural Resources, in collaboration with the Ministry of Water and the County governments, can put in place a sustainable plan for supplying water both from the national water reservoirs and drilled boreholes. This will serve the purpose of supporting economic activities as well as supporting reforestation efforts. Such measures should also be accompanied by soil conservation measures.

[111] Para. 14.2.

The *National Land Reclamation Policy*[112] was informed by the fact that over 80% of Kenyan land surface that include the Arid and Semi-Arid Lands (ASALs) is fragile and has a population of about 11 million people, the great majority of who live below the poverty line and suffer effects of widespread aridity, acute food and water shortage, as well as general insecurity.[113] The remaining 20% of Kenya land mass is non-ASALs and is arable land often referred to as high potential or humid areas, in which the most affected areas are located in hilly and mountainous regions experiencing de-vegetation or clear cutting of forests, diminishing soil fertility due to poor soil management or cultivation on steep slopes, among other impacts.[114]

In efforts to combat land degradation through, inter alia, intensified soil conservation, afforestation and reforestation activities, Agenda 21 requires governments to, inter alia: implement urgent direct preventive measures in drylands that are vulnerable but not yet affected, or only slightly desertified drylands, by introducing (i) improved land-use policies and practices for more sustainable land productivity; (ii) appropriate, environmentally sound and economically feasible agricultural and pastoral technologies; and (iii) improved management of soil and water resources; carry out accelerated afforestation and reforestation programmes, using drought resistant, fast-growing species, in particular native ones, including legumes and other species, combined with community-based agroforestry schemes.

Further, the Governments at the appropriate level, with the support of the relevant international and regional organizations, are expected to, inter alia: develop land-use models based on local practices for the improvement of such practices, with a focus on preventing land degradation. The models should give a better understanding of the variety of natural and human-induced factors that may contribute to desertification. Models should incorporate the interaction of both new and traditional practices to prevent land degradation and reflect the resilience of the whole ecological and social

[112] The Ministry Of Water and Irrigation, *National Land Reclamation Policy*, February 2013 (Government Printer, Nairobi, 2013).
[113] P. 8.
[114] Ibid; See also Republic Of Kenya Ministry Of Environment, *Water And Natural Resources, Draft National Forest Policy, 2015*. (Government Printer, Nairobi, 2015).

system; develop, test and introduce, with due regard to environmental security considerations, drought resistant, fast-growing and productive plant species appropriate to the environment of the regions concerned. [115] Community participation in dealing with land degradation is one of the effective ways and channels through which such traditional knowledge on sustainability can be tapped to enhance environmental health and security. They are also in a better position to implement measures directed at eliminating human induced factors that may contribute to environmental degradation.

From the various international environmental instruments, it is important that land degradation problem be addressed urgently, by tackling the contributing factors which include inappropriate anthropogenic activities such as clear-cutting of forest and other vegetation, logging and firewood gathering, bush encroachment, invasion of alien species, charcoal production, mining, human settlement, infrastructural and industrial development, uncontrolled fires, livestock overstocking and overgrazing, among others.[116] These problems cannot be addressed through legislation without taking tangible measures, in collaboration with the local communities to tackle them. It is time to go beyond legislation and involve the people who are directly affected in coming up with lasting and effective measures.

A former Cabinet Secretary, Ministry of Water and Irrigation, in the *National Land Reclamation Policy* observed that sensitizing communities to use sustainable agricultural practices and technologies in order to reduce extensive cultivation associated with low input agriculture, is a pragmatic action to discouraging wanton clearance of forest resources.[117] She went further to state that while ensuring propagation of farm woodlots, the government will perpetually promote use of improved cooking stoves and green energy like geothermal, wind, solar, and biogas; to stop reliance on wood fuel and charcoal for cooking and heating. These strategies will translate into up-to 10% forest cover and its robust conservation thus

[115] Para. 12.19.
[116] Ibid, p. 8.
[117] Ibid, p. 2.

increasing carbon storage as well as cutting on greenhouse gases to mitigate effects of climate change such as increased frequency and magnitude of many types of extreme events, including floods, droughts and tropical cyclones.[118] One way of achieving this would be innovation and creativity to actualize the use of improved cooking stoves and green energy like geothermal, wind, solar, and biogas, which will in turn facilitate job creation and improved production and consumption methods.

The Ministry can work with various stakeholders to realise such objectives. Indeed, the Ministry of Environment and Natural Resources is well aware of this and what is required is action. The Environment Permanent Secretary is on record urging that there is need to improve adaptive capacities for communities through existing indigenous knowledge in combating the impacts of climate change. He observed that the use of such knowledge is critical in identifying and disseminating innovations which enhance food productivity in the face of climate change.[119] Communities, with support from the Government, can come up with localized yet effective means of improving production, environmental conservation and reversing the effects of climate change, for enhanced environmental security. In the long term plans, the state should put in place adequate measures to address the chronic poverty in some regions through integrated measures that boost economic status of the people while ensuring environmental sustainability.

Public participation in the management, protection and conservation of the environment, coupled with the protection of genetic resources and biological diversity can be one of the effective ways of achieving environmental security for the present and future generations. It is also an effective way of identifying and eliminating processes and activities that are likely to endanger the environment since communities are conscious of such activities that can compromise their livelihoods. This may be informed by the *principle of subsidiarity*, where, arguably, the local communities are the best placed to address the burning environmental issues such as pollution, degradation and

[118] Ibid.
[119] The Ministry Of Water and Irrigation, 'Indigenous Knowledge to Tackle Climate Change,' available at http://www.environment.go.ke/?p=1479 [Accessed on 06/05/2022].

over-utilisation (emphasis added).[120] They only need technical support from the Government and through collaboration, they can come up with lasting solutions. Where they are not well informed, public awareness through civic education and agricultural field trainings can help them identify the issues.

With adequate and meaningful participation in decision making and environmental conservation, all factions in the society feel appreciated and have a sense of belonging. They are also able to voice and address their concerns in diplomatic ways that in turn boost security in a country. If the recurrent resource-based conflicts in the Northern parts and North Rift regions of country are to be permanently addressed, then the environmental resource scarcity in the areas must be dealt with to eliminate the environmental scarcity pressure. With all parties having adequate resources for their livelihoods, none of the communities feel any pressure to attack their neighbours as it is the case with scarce resources. Lasting security solution in some of these areas is closely associated with environmental security.

Where funds are allocated for environmental protection, the local people should adequately be represented in deciding the most urgent issues that ought to be addressed. This will not only boost efficiency but will only curb corruption and ensure better management of the funds. The various sectoral laws, including wildlife, water, forests and wetlands have come up with special kitty to facilitate conservation and effective management of resources. Communities ought to be evidently and adequately represented in committees dealing with such kitty to curb corruption and improve management.

[120] See the *East African Community Protocol on Environment and Natural Resources Management*, 2005. Art. 4 (2) (p). One of the principles of environment and natural resources management is: the principle of subsidiarity in the management of the environment and natural resources; See also generally, *Protocol (No 2) on the application of the principles of subsidiarity and proportionality*, annexed to the Treaty on European Union and the Treaty on the Functioning of the European Union by the Treaty of Lisbon of 13 December, 2007; See also Article 5 of the Treaty on European Union, C 326/1.

There is also need to establish efficient systems of Strategic Environmental Assessment (SEA), Environmental Impact Assessment (EIA), Environmental Audit and Monitoring of the environment and Environmental Security Assessment (ESA). Strategic Environmental Assessment (SEA) is defined as the process by which environmental considerations are required to be fully integrated into the preparation of policies, plans and programmes and prior to their final adoption.[121] The objectives of the SEA process are to provide for a high level of protection of the environment and to promote sustainable development by contributing to the integration of environmental considerations into the preparation and adoption of specified policies, plans and programmes.[122] Environmental impact assessment means a systematic examination conducted to determine whether or not a programme, activity or project will have any adverse impacts on the environment. [123] Environmental audit means the systematic, documented, periodic and objective evaluation of how well environmental organisation, management and equipment are performing in conserving or preserving the environment.[124] Strategic Environmental and Social Assessment (SESA) is a more effective tool since it integrates the social issues that are likely to emerge and not just the environmental considerations.[125]

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[121] Environmental protection Agency, 'Strategic Environmental Assessment,' available at http://www.epa.ie/monitoringassessment/assessment/sea/#.Vi5tmGuJ2CA [Accessed on 06/05/2022].

[122] Ibid; See also the *Environmental (Impact Assessment and Audit) Regulations, 2003*, Legal Notice 101 of 2003, Regulations 42, 43 & 47.

[123] *Environmental Management and Co-Ordination Act*, No 8 of 1999 (Government Printer, Nairobi, 1999), s.2.

[124] Ibid.

[125] Notably, the proposed law, *Energy Act, No.1 of 2019*, requires under section 107 (2) (d) that a person who intends to construct a facility that produces energy using coal shall, before commencing such construction, apply in writing to the Authority for a permit to do so. Such an application must be accompanied by, inter alia, a Strategic Environment Assessment and Social Impact Assessment licenses. Also notable are the provisions of s. 57A(1) of the *Environmental Management Co-ordination (Amendment) Act 2015* which are to the effect that all policies, plans and programmes for implementation shall be subject to Strategic Environmental Assessment. If fully implemented, this is a positive step towards achieving environmental security for all.

These exercises should not be just a matter of formality and paper work.[126] The affected communities should be afforded an opportunity to meaningfully participate and give feedback on the likely effects on social, economic and environmental aspects of the community.

Art. 70 (1) provides that if a person alleges that a right to a clean and healthy environment recognised and protected under Article 42 has been, is being or is likely to be, denied, violated, infringed or threatened, the person may apply to a court for redress in addition to any other legal remedies that are available in respect to the same matter. Courts have a great and important role to play in facilitating realisation and safeguarding of environmental security. They should be driven by not only anthropocentric arguments for environmental conservation but also ecocentric justifications.

An ecocentric approach to environmental conservation was witnessed in the Tanzanian case of *African Network for Animal Welfare (ANAW) v The Attorney General of the United Republic of Tanzania*,[127] where the Africa

[126] See generally, United Nations, *Environmental Impact Assessment and Strategic Environmental Assessment: Towards an Integrated Approach*, (UNEP, 2004). Available at http://www.unep.ch/etu/publications/textONUbr.pdf [Accessed on 06/05/2022]; See also The World Bank, 'Strategic Environmental Assessment,' September 10, 2013. Available at http://www.worldbank.org/en/topic/environment/brief/strategic-environmental-assessment [Accessed on 26/10/2015]. The World Bank argues that policy makers in are subject to a number of political pressures that originate in vested interests. The weaker the institutional and governance framework in which sector reform is formulated and implemented, the greater the risk of regulatory capture. The World Bank observes that in situations such as these, the recommendations of environmental assessment are often of little relevance unless there are constituencies that support them, and with sufficient political power to make their voices heard in the policy process. While strong constituencies are important during the design of sector reform, they are even more important during implementation. It follows that effective environmental assessment in sector reform requires strong constituencies backing up recommendations, a system to hold policy makers accountable for their decisions, and institutions that can balance competing and, sometimes, conflicting interests. The World Bank thus affirms its recognition of the strategic environmental assessment (SEA) as a key means of integrating environmental and social considerations into policies, plans and programs, particularly in sector decision-making and reform.

[127] Reference No. 9 of 2010.

Network for Animal Welfare (ANAW), a Kenya non-profit organization, filed a case in the East Africa Court of Justice (EACJ) challenging the Tanzanian government's decision to build a commercial highway across the Serengeti National Park. On June 20, 2014, the court ruled that the government of Tanzania could not build a paved (bitumen) road across the northern section of the Serengeti, as it had planned. It issued a permanent injunction restraining the Tanzanian government from operationalising its initial proposal or proposed action of constructing or maintaining a road of bitumen standard across the Serengeti National Park subject to its right to undertake such other programmes or initiate policies in the future which would not have a negative impact on the environment and ecosystem in the Serengeti National Park. This was also the case in In *Peter K. Waweru v Republic*,[128] where the Court observed that …environmental crimes under the Water Act, Public Health Act and EMCA cover the entire range of liability including strict liability and absolute liability and ought to be severely punished because the challenge of the restoration of the environment has to be tackled from all sides and by every man and woman…. It went further to state, ―…In the name of environmental justice water was given to us by the Creator and in whatever form it should never ever be the privilege of a few – the same applies to the right to a clean environment.[129]

Courts can take proactive measures to ensure conservation and protection of the environment for sustainable development. They can ensure that communities and other private persons enjoy environmental democracy especially where such communities approach courts seeking justice and access to environmental information, and demand enforcement of environmental laws or compensation for damage. Courts can work closely with such the local bodies to adequately and peaceably address conflict or disputes. For instance, the , *Irrigation Act 2019,*[130] provides for dispute resolution mechanisms in context of irrigation water user associations and provides for mechanisms for appeal and review by the Environment and Land court. In such instances, the court can ensure that environmental justice

[128] [2006] eKLR, Misc. Civ. Applic. No. 118 of 2004.
[129] p.14.
[130] Irrigation Act, No.14 of 2019, Part VII

is served. Where state decision makers or such local bodies or tribunals attempt to bypass the legal requirements on public participation in decision-making in matters that greatly affect the livelihoods of a particular group of people, courts can use its constitutional powers to enforce the law. Achieving environmental security requires the concerted efforts of all stakeholders and collaboration between the various interested parties and decision-makers.

5.1 Environmental Security as a means to an end

While a proper environmental security mechanism ensures that access to environmental goods and services is available to all, many Kenyans continue to ravage in poverty with no ability to benefit from the environmental resources capable of being generated from the surrounding environment. Many user groups are still finding it hard to enjoy environmental goods and services, while facing social problems such as, poor sanitation, lack of clean water, and an array of pollutants, amongst others. Although there have been widespread calls for a more secure environment, the uptake of actions to curb the same has been dismal and insufficient, to say the least. State and governmental efforts have not been satisfactory to address the problem.

It is generally agreed that conflict over scarce resources, such as minerals, fish, water, and particularly territory, is a traditional source of armed struggle.[131] 'It is also not in question that environmental degradation may be viewed as a contribution to armed conflict in the sense of exacerbating conflicts or adding new dimensions'.[132] This is well demonstrated in the armed conflicts in parts of Kenya's Tana Delta, Rift Valley Region and Northern parts of the country, where inter-ethnic resource-based conflict has been prevalent.[133] However, resource abundance can also lead to conflict

[131] N.P. Gleditsch, "Armed Conflict and the Environment: A Critique of the Literature," *Journal of Peace Research*
Vol. 35, No. 3, *Special Issue on Environmental Conflict* (May, 1998), pp. 381-400, p. 381.
[132] Ibid, p. 382.
[133] See generally, M. Wepundi, *et al*, "Availability of Small Arms and Perceptions of Security in Kenya: An Assessment," *Special Report, June 2012*, (Small Arms Survey, Graduate Institute of International and Development Studies, Geneva, 2012). Available at http://www.smallarmssurvey.org/fileadmin/docs/C-Special-reports/SAS-SR16-Kenya.pdf [Accessed on 06/05/2022].

over resources as has been witnessed in many African States.[134] Efforts towards achieving environmental security must therefore tackle problems related to the two instances, where they are likely to occur. Environmental security involves addressing environmental degradation, resource depletion, natural disasters, and pollution, amongst others.[135]

In the recent years, Kenya has experienced various security threats from external sources, namely Al Shabaab,[136]as well as internal inter-ethnic and inter-clan conflict which are mainly fueled by conflicting interests and competition over resources.[137] While the State forces, mainly National Police service and Kenya Defence Forces, can deal with the external attacks more

[134] For instance, the following countries have experienced internal natural resources-related conflict that may be attributed to resource abundance: South Sudan, Liberia, Sierra Leone, Democratic Republic of Congo, Congo -Brazzaville, Central African Republic, amongst others; See also generally, G. King & V. Lawrence, Africa, "A Continent in Crisis: The Economic and Social Implications of Civil War and Unrest among African Nations," *EDGE*, Final Spring 2005, June, 2005; see also, M. Jenkins & E. Umoh, Africa in Conflict and Crisis: Critical Perspectives on the Role of Conflict Diamonds and Oil on the Livelihood of Sierra Leone and Nigeria.' Autumn, 2002; *Wiwa v. Royal Dutch Petroleum* Co., 226 F.3d 88 (2d Cir. 2000), cert. denied, 532 U.S. 941(2001); Institute for Environmental Security, "What is Environmental Security?"
Available at http://www.envirosecurity.org/activities/What_is_Environmental_Security.pdf [Accessed on 06/05/2022].

[135] M. Wepundi, *et al*, "Availability of Small Arms and Perceptions of Security in Kenya: An Assessment," *op cit*, p.7.

[136] Islamist militant group *al-Shabaab* operates from Somalia, and has been carrying out terrorist attacks against Kenya.

[137] See generally, A.H. Haji, *Inter-Clan Peace Initiative in Mandera County: A Case of Gurreh and Murulle Communities from 1998 to 2012*, Research Project Submitted in Partial Fulfillment of the Requirements for the Degree of Master of Arts in Armed Conflict and Peace Studies, of the University of Nairobi, December 2014. Available at http://erepository.uonbi.ac.ke/bitstream/handle/11295/76901/Alinur_Inter-clan%20peace%20initiative%20in%20Mandera%20county%3A%20a%20case%20of%20Qurreh%20and%20Murulle%20communities%20from%201998%20to%202012.pdf?sequence=1 [Accessed on 13/10/2015]; See also, Institute for Peace and Security Studies in Collaboration with Friedrich Ebert Stiftung, *Anthology of Peace and Security Research*, (Addis Ababa, Ethiopia, Vol. 3, December, 2012), p. 5. Available at http://library.fes.de/pdf-files/bueros/aethiopien/09883.pdf [Accessed on 06/05/2022].

effectively, it is arguable that the solution to the internal conflict lies in something deeper than the use of force. Any feasible approach must address the root causes of these internal conflicts. While addressing any ongoing aggression between communities and clans through more reactive means, it is important that measures that pre-empt recurrence of such conflict are adopted. Measures that are geared towards achievement of environmental security for all would go a long way in addressing such conflict, by ensuring that such factors as environmental degradation, resource depletion, natural disasters, and pollution, amongst others are adequately dealt with to guarantee environmental security for all.

6. Conclusion

Environmental security is not only concerned with sustainable management of natural resources for the sake of achieving sustainable development but also incorporates the moralistic duty to conserve the environment for the sake of the other forms of life namely animals and plants. The quest for sustainable development should not only be informed by the human desire to secure their future but should also include the duty to safeguard the environment for its own sake. Further, as it has been argued in this paper, achieving peace in the country is pegged on a number of issues, one of which is ensuring human security through guaranteed enjoyment of environmental goods and services for all. It is imperative that all the relevant stakeholders join hands in their efforts to conserve and protect the environment for a better, healthy and secure environment that will guarantee better lives for the human race, animals and plants. Achieving environmental security in Kenya is possible. It is an ideal that is attainable, for the sake of the environment and the people of Kenya.

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Securing the Right to Strike for Workers in Essential Services in Kenya

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I Introduction

Rationalizing the need for the Right to Strike in Essential Service

The capitalistic nature of the world's economy has largely shaped labour relations between employer and employee. The employment relationship often manifests the working out of an unequal power balance and subordination of one party to the other.[1] The employee is more often than not the weaker party in the employment relationship while the employer wields a higher bargaining power. This is because the employer controls or is in ownership of the capital and the productive resources made available to the employee.[2] The power balance tilts towards the employer who can arbitrarily exercise it to the detriment of the employee's welfare.

Workers, viewed through the lens of capitalism, are regarded as a means to an end. Employers seek to maximize the labour services they offer in a bid to make a higher profit margin. This aim is in most cases pursued to the disadvantage of the employee. This is the case even for workers in essential services. Consequently, the employee is susceptible to abuse and it is no surprise, the numerous instances of employers infringing on the fundamental rights of their employees. Cases of overworking, payment that is not commensurate to the work done, poor working conditions and harassment characterize the employment relations within the labour market.[3]

This predicament necessitates a mechanism through which the power dynamics in the labour relations between the employer and employee can be

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[1] Bess Nkabinde, The Right to Strike as an essential component of Workplace Democracy: Its Scope and Global Economy (2009) 24 Md. J. Int'l. (2009) 270.
[2] Ac Basson, The Labour Appeal Court and the Right to Strike, S. Afr. Mercantile L. J. (1994).
[3] Nkabinde (n 1).

balanced. It is important for employees to be able to voice out the grievances which arise in their places of work and defend the protection of their labour rights. This need is fueled by the debate to view labour rights as human rights thus necessitating a higher threshold for their protection.[4]

The freedom of association as applied in labour law[5] led to right of workers to form and join trade unions. This right became the foundation of effective collective bargaining[6] and a means through which employment rights can be enforced.[7] Collective bargaining provides the concerted effort needed to counter the employer's position of power.[8]It is considered as an enabling right through which other labour rights can be secured by the workers. [9] Parties to the employment relationship initiate collective bargaining processes due to dissatisfaction in their work place.[10] Through this process, parties can negotiate better terms and conditions of employment[11]and the maintenance of industrial peace is achieved.[12]The process of collective bargaining, though often considered of utmost importance to the employees through their trade unions, is equally important

[4] Valerio De Stefano, Non-Standard Work and Limits on Freedom of Association: A Human Rights- Based Approach, Ind. Law J (2017).
[5] Urmila Bhoola, National Labour Law Profile: South Africa (2002).
[6] Tamara Cohen, Limiting Organizational Rights of Minority Unions: POPCRU v LEDWABA 2013 11 BLLR 1137 (LC) PER/PELJ (2014).
[7] M. O' Sullivan et al., Is Individual Employment Law Displacing the Role of Trade Unions? (2015) 44 ILJ 222-45.
[8]Basson (n 2).
[9] Claire La Hovary, Showdown at the ILO? A Historical Perspective on the Employers' Group's 2012 Challenge to the Right to Strike, Ind. Law J (2013) 42 (4) 338.
[10] MM Botha, In Search of Alternatives or Enhancements to Collective Bargaining in South Africa: Are Workplace Forums a Viable Option? PER/PELJ 2015 (18) 5.
[11] Esser I, Stakeholder Protection: The Position of Employees, THRHR (2007) 407 – 426.
[12] Godfrey S, Theron J and Visser M, The State of Collective Bargaining in South Africa: An Empirical and Conceptual Study of Collective Bargaining (Development Policy Research Unit, University of Cape Town 2007) .

to the employers' through their organizations.[13] It is therefore a mutual process for both parties to reach mutual agreements on the issues raised.[14] Central to the process of collective bargaining is the right to strike.[15]The right to strike plays the role of an effective economic weapon to strengthen the worker's position thus acting as a balance to the power relations of employer and employee.[16]This right pertains to the individual worker but is exercised collectively. Through the withdrawal of their labour services, workers can mount pressure on their employers to address their complaints and uphold their labour rights.[17]The right to strike further enables employees to exercise their bargaining power as against the employers and secure better working conditions. As such, without this right to strike, collective bargaining is largely compromised.[18]

The significance of the right to strike cannot be over emphasized given the central role it plays in effective labour relations.[19] This explains its regard as an important component of any democracy and its inclusion in the Constitutions of some countries.[20]

Kenya, in recognition of its duties under International Labour Law and having ratified a number of labour conventions under the International

[13] Sunday Samson Babalola and Ajibola Ishola, Perception of Collective Bargaining and Satisfaction with Collective Bargaining on Employees' Job Performance, Corporate Ownership and Control/ (2017) Volume 14, Issue 2.
[14] Cloutier J, Denis P.L and Bilodeau H, Collective Bargaining and Perceived Fairness: Validating the Conceptual Structure, Relations Industrielles/Industrial Relations, (2012) 67 (3), 398-425.
[15]Black Allied Workers Union v. Prestige Hotels CC t/a Blue Waters Hotel (1993) ILJ 963 (LAC) at 97IJ-9724.
[16]BTR Dunlop Ltd v. National Union of Metalworkers (2) 1989 10 ILJ 701 (IC).
[17] Mario E. Ackerman, The Right to Strike in Essential Services in MERCOSUR Countries, Int'l Lab Rev, (1994) 385.
[18] Ernest Manamela and Mpfari Budeli, Employees' Rights to Strike and Violence in South Africa, Comp. & Int'l L. J. S. Afr. (2013) 308.
[19] Tamara Cohen and L. Matee, Public Servants' Right to Strike in Lesotho, Botswana and South Africa- A Comparative Study PER/PELJ 2014 (17) 4.
[20] Nkabinde (n 1).

Labour Organization (ILO), provides for this right in its Constitution.[21] Article 41 of the Kenyan Constitution provides for the rights which are protected in the labour relations with sec. 41 (2) (d) particularly stating that every worker has the right to go on strike. The Labour Relations Act of Kenya which aims at 'promoting sound labour relations through the protection and promotion of freedom of association and the encouragement of effective collective bargaining' provides for the participation in strikes by employees.[22] Accordingly, the purpose of the Act is to provide for organizational rights for trade unions, facilitate collective bargaining within the work place and to regulate the right to strike.

Kenya has made attempts to protect the workers' labour rights particularly the right of workers to strike through its legislative framework. Ideally, the right to strike should be freely exercised by all employees in all working areas but as analysed below, this is not the case in the Kenyan Context

II The Kenyan Context of The Right To Strike For Workers' In Essential Services Limitation of the Right to Strike for Workers' in Essential Services in Kenya

Having rationalized the importance with which the right to strike should be regarded in the labour relations, it is needful to equally note the fact that strikes do have an adverse impact not only the economic interests of the employer but also third party rights.[23] These third parties are usually the consumers of the services offered by the workers. It is in appreciation of this fact that a limitation on the right to strike is often sought by States.

The Constitution of Kenya provides for the limitation of the rights enshrined in its Bill of rights indicating that the worker's right to strike is not absolutely guaranteed.[24] However, any such limitation of a right or fundamental freedom has to be by law and only to the extent that it is reasonable and

[21] The Freedom of Association and Protection of the Right to Organize, Convention 87 of 1948 and the Convention on the Right to Organize and Collective Bargaining, Convention 98 of 1949.

[22] Labour Relations Act 2007, S 76.

[23] Horsten D and Le Grange C, The Limitation of the educator's right to strike by the child's right to basic education, Southern African Public Law (2012) 27 (2): 509 -538.

[24] Constitution of Kenya 2010, Art. 24.

justifiable in an open and democratic society based on human dignity, equality and freedom.[25] Consequently, any limitation of the right to strike which does not meet this threshold is unlawful and robs workers of an effective bargain tool thus contributing to the suppression of workers.[26] This means that there should not be an arbitrary usurpation of workers' right to industrial action without legitimate reasons including those engaged in essential services.

In the case of Kenya, the right to strike for workers in general is limited. This is the case given that sec. 76 of the Labour Relations Act lays out the conditions under which one may participate in a strike or lock-out. These conditions are;

i. The trade dispute which forms the subject of the strike must concern terms and conditions of employment or the recognition of a trade union.
ii. The trade dispute remains unresolved after conciliation under the Act or as specified in a registered collective agreement which provides for the private conciliation of disputes.
iii. There needs to be a seven days written notice of the strike given out to other parties and to the Minister by the authorized representative of the trade union.

The fulfillment of these conditions qualifies the strike as protected under the law and employees can lawfully participate in it. The employees who participate in a protected strike are exempted from and dismissal, disciplinary action or the institution of civil proceedings against them. Sec. 78 of the Labour Relations Act on the other hand provides for certain circumstances where strikes are prohibited. These circumstances include;

i. Where any law, court award or a collective agreement or recognition agreement binding on that person prohibits a strike or lock-out in respect of the issue in dispute

[25] Ibid.
[26] Carole Cooper, Strikes in Essential Services, Indus. L. J. Juta (1994) 903.

ii. In the event that the subject matter of the strike or lock-out is regulated by a collective agreement or recognition agreement bonding on the parties to the dispute
iii. Where the parties have agreed to refer the trade dispute to the Industrial court or to arbitration
iv. Where the trade union has referred the dispute to the Industrial Court.
v. Where the trade dispute was not referred for conciliation in terms of the Act or a collective agreement providing for conciliation
vi. In the event that the employer and employees are engaged in an essential service
vii. Where the strike is not in furtherance of a trade dispute
viii. Where the strike constitutes a sympathetic strike

Any employee who takes part in or incites others to participate is a prohibited strike breaches the employee's contract and is liable to disciplinary action and is not entitled to any payment or benefit under the Employment Act during the period he or she participated in the strike.[27] While these provisions may be deemed as having a limiting effect on the right to strike for workers in Kenya, a number of employees can still engage in strikes as long as they meet the laid down requirements.

However, this is not the case for workers engaged in essential services. The Labour Relations Act provides for an absolute prohibition of the right to strike for those who work in essential services. Sec. 81 (3) states that there shall be no strike or lock-out in an essential service. This means that such workers cannot join the rest in advancing their interests in the workplace through industrial action.

The act defines 'essential services' as a service the interruption of which would probably endanger the life of a person or health of the population or any part of the population.[28] What constitutes an essential or a non-essential service would depend on a country's need and is best interpreted from a case to case basis. However, in its decision to designate a service as essential or

[27] Labour Relations Act 2007, s 80 (1) (a) and (b).
[28] Ibid, s. 81.

not, a country should take into account the objective criteria in the definition.[29]

The definition of what constitutes an essential service is partially exclusive in and of itself: Not every service fits into this definition. There should be a reasonable causative link rather than a 'mere possibility' between the interruption of the service and the danger which such interruption would pose to the population. The requirement that this interruption endangers the life, personal safety or health of the population is also restrictive on three grounds. First, it excludes mere hardship or inconvenience that may be experienced by the withdrawal of these services. Secondly, it is the life, personal safety and health of the population which must be affected and not their economic, proprietary or pecuniary interests. Lastly, it is the people who are envisaged as the population which must be affected therefore withdrawal of services which would negatively affect plants or animals may not be considered as essential.

The inherently exclusive nature of the definition of an essential service guards against a blanket classification of most services as essential. This is important considering the effect of such classification on the labour rights of the workers in these services. A general classification would unnecessarily restrict the right to strike of workers employed in these services.

The Designation of a Service as Essential in Kenya

The International Labour Organization (ILO) has held essential services to include the hospital sector, water supply, air traffic control and telephone services.[30] Kenya seems to have borrowed from the ILO with regard to the designation of services as essential. In Kenya, these services are;

i. Water Supply Services.
ii. Hospital Services.

[29] International Labour Organisation (ILO) Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO 5th ed. (ILO Geneva 2006) (581).

[30] ILO: Freedom of Association. Digest of decisions and principles on the Freedom of Association Committee of the Governing Body of the ILO, 3rd Edition, Geneva 1985, (409), (410), (412) and (427).

iii. Air Traffic Control Services and Civil Aviation Telecommunication Services.
iv. Fire Services of the Government or Public Institutions.
v. Posts Authority and Local Government Authorities.
vi. Ferry services.[31]

The Minister in consultation with the National Labour Board may amend the list of essential services as listed out in the Fourth Schedule of the Labour Relations Act.[32] He or she may also declare any other service as essential where a strike is so prolonged as to endanger the life, person or health of the population or any part of the population.[33]

It should be noted though that the concept of essential services is not an absolute one neither should it be. A non-essential service could become essential if the duration and extent of its withdrawal by workers endangers the life, health and safety of the population. An essential service may equally cease to be so with increasing technological advancements and changes in geographical location or timing.

The enlisting of services as essential has been ineffective in deterring the workers engaged in these services from striking. In Kenya, despite the fact that hospital services has been listed as essential and therefore no strike is legally permissible for those who offer such services, there has been reoccurring strikes over the years in the medical field by both doctors and nurses. One would question the efficacy of prohibiting the right to strike for workers in essential services when they still resort to industrial action. Is the prohibition justifiable? Are there other means to advance the cause of the workers in essential services and address their grievances? If these mechanisms were effective enough, workers in essential services would not risk the consequences of participating in prohibited strikes.

[31] Labour Relations Act 2007, Fourth Schedule.
[32] Ibid, s 81 (2) (a).
[33] Ibid, s 81 (2) (b).

III The Limitation of the Right to Strike for Workers in Essential Services in Kenya: Is it Justifiable?

For the limitation of any right in Kenya's bill of rights to be legitimate, there is laid down a criterion of relevant factors which should be taken into account as listed by the limitation clause enshrined in the Constitution. One should consider the nature of the right or fundamental freedom, the importance of the purpose of the limitation, the nature and extent of the limitation, the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others, the relation between the limitation and its purpose and finally whether there is a less restrictive means to achieve the purpose of the limitation.[34] These factors are analysed below in the specific context of Kenya's limitation of the right to strike for workers in essential services to assess whether the prohibition of their right to strike is justifiable.

i) The Nature of the right

Rights are generally classified into derogable and non-derogable rights.[35] Derogable rights are those which can be limited in certain circumstances.[36] Non-derogable rights on the other hand should not be restricted, suspended or limited by States.[37] In Kenya, the fundamental rights and freedoms which may not be limited are;

i. The freedom from torture, cruel, inhumane or degrading treatment or punishment,
ii. The freedom from slavery or servitude
iii. The right to a fair trial
iv. The right to an order of *habeaus corpus*[38]

The right to strike has not been listed as a non-derogable right under Article 25 of the Kenyan Constitution. It is evident that the inclusion of the right to strike in Constitution shows the high regard with which this right is held

[34] Constitution of Kenya 2010, Art 24 (1).
[35] Riccardo Pisillo Mazzeschi, 'Distinctions Between Human Rights Categories.' *International Human Rights Law*. Springer, Cham, 2021. 237-252.
[36] Ibid.
[37] Ibid.
[38] Constitution of Kenya, Art. 25.

particularly as a 'weapon in collective bargaining'[39] However, as it has been established this right is not absolute in the Kenyan context.[40] There is currently no legal system which upholds an unrestricted right to strike despite its inclusion in the relevant Constitution.[41] The Constitution provides that the rights contained in its bill of rights are subject to the limitation clause in Article 24. As such, the limitation clause extends to all rights in the bill of rights including the right to strike.[42] The right to strike can therefore be limited on reasonable and justifiable grounds.

ii) The Importance of the Purpose of the Limitation

The limitation of the right to strike for workers in essential services stems from the nature of the services they offer. Essential services are necessary to ensure the protection of people's health, lives and safety. It is the service in itself that is essential, neither the worker nor the industry. An interruption or withdrawal of these services then adversely affects the health and wellbeing of the society at large. The damage done in such instances is irreparable in comparison to pecuniary losses sustained by either the worker or the employee during the striking period.

In the case of medical services for instance which are designated as essential, strikes of doctors or nurses have often resulted to the death of many patients and the hampering of health care systems. In 2017, the doctors' strike which lasted 100 days had detrimental effect on the health of many patients in Kenya. A majority were turned away from public hospitals and those who could afford resorted to private hospitals. Pregnant mothers, terminally ill patients such as those with cancer, accident victims and those in need of

[39] Bob Hepple, 'The Freedom to Strike and its Rationales' in Bob Hepple, R. Le Roux and S. Sciara (eds), Laws against Strikes. The South African Experience in an International and Comparative Perspective (Milano: Franco Angeli 2015).
[40] Lisa Rodgers, Public Employment and Access to Justice in Employment Law, Ind. Law. J. 43 (2014) (4): 373.
[41] H. Cheadle 'Constitutionalizing the Right to Strike' in Bob Hepple, R. LeRoux, S. Sciara (eds), Laws against Strikes. The South African Experience in an International and Comparative Perspective (Milano: Franco Angeli 2015).
[42] IM Rautenbauch , The Limitation of Rights in Terms of Provisions of the Bill of Rights Other that the General Limitation Clause: A Few Examples , J. S. Afr. L. (2001) 617.

emergency treatment were denied medical attention and some lost their lives.[43]

One may rightly argue then that this limitation is done in the interest of the general public. Undoubtedly, it is in the public interest for instance to ensure that health services are made available and accessible to all and at all times. This is because the right to health is closely linked to one's personal well-being and forms an integral part of the right to life which is infact a non-derogable right. Kenya is therefore obligated to guarantee its citizens' right to the highest attainable standards of health care. This includes ensuring that there is a proper health care system where patients receive health care services when needed. It is important therefore to put measures in place limiting obstructions or interruptions of these services to the consumers. The purpose of limitation may be the need to ensure that the enjoyment of rights and fundamental freedoms by the workers does not prejudice the rights and fundamental freedoms of third party consumers in this case the patients which also a factor to be considered when limiting a right. These measures therefore attempt to strike the delicate balance between the workers' right to industrial action through downing their tools and the general public interest in the availability of essential services.[44]

iii) The Nature and extent of the Limitation.

The right to strike for workers in essential services in Kenya is absolutely prohibited. Sec. 81 (3) which states that there shall be no strike or lock-out in an essential service absolutely limits this right, neither are there any exceptions under the Kenyan law where a strike in an essential service may be legally permissible. The absolute prohition of this right however derogates from the essential content of the right and operates to negate it altogether. Kenya's approach is unnecessarily rigid and a less restrictive means to achieve the purpose of limitation should be sought.

[43] Vera Okeyo and Elizabeth Merab, Doctors' Strike is over but the pain , Deaths and costs will be felt for many years, (2017).

[44] Andrew Hodge 'Strikes in Essential Services- Balancing Essential Interests' *Law & Just, Christian L. Rev.* (1990).

iv) The Relation between the limitation and its purpose

As highlighted, there is a need to have continual availability and accessibility of essential services due to the drastic effect that a withdrawal of these services would have on the health, lives and personal safety of the consumers. This need justifies the limitation on the right to strike for workers in this sector. The limitation achieves the purpose pursued given that the legal backing which characterizes this limitation ensures legal certainty and assurance to the consumers that these services will not be unnecessarily withdrawn.

v) The Availability of a less restrictive means to achieve the purpose.

It is undisputed that workers in essential services still need an avenue to air their grievances despite the fact that one would rationalize the limitation of their right to strike. They need a mechanism that would be coercive enough to counter the employer's status and set in motion the resolution of their disputes. The designation of a service as essential has been viewed as a constitutional violation because it infringes on the workers' right to strike.[45]On the other hand, the grave consequences on the lives and health of people which occasions a withdrawal of these services during a strike period cannot be ignored. There needs to be a way in which the purpose of this limitation is met in consideration of the right of workers in essential services to strike.

In *Okiya Omtatah Okoiti v AG & 5 Others*[46], the issue of limiting the right to strike for workers in essential services formed the core of the case. The Kenya National Union of Nurses (KNUN) had issued a 21 days strike notice for nurses to commence the strike. The strike notice was prompted by the Government's failure to sign and facilitate registration of the negotiated Collective Bargaining Agreement and to confirm into permanent and pensionable terms of service all nurses on contract. The Petitioner moved to court seeking;

[45] Sandile July and Bradley Workman, The Right to Strike: Essential Services and Minimum Service Agreements, (2013).
[46] Petition 70 of 2014, (2015) eKLR available at kenyalaw.org/caselaw/cases/view/117680/ accessed on 25/01/2019.

i. A declaration that the impugned pending strike by KNUN was illegal.
ii. A declaration to be issued for the state to enact a legal and policy framework to secure the rights of workers in essential services,
iii. A mandatory order to the permanent secretary labour, permanent secretary health, permanent secretary devolution and the Public Service

The court acknowledged the fact that workers in essential services are 'left to their own devices' to address their grievances. They resort to strikes due to the lack of legislation and policies which safeguards their rights and provides for an effective mechanism to resolve disputes in essential services. The court also pointed out that the limitation in Sec. 81 (3) of the Labour Relations Act is absolute and derogates from the core of the right to strike. It seeks to nullify the constitutional provision of the right to strike under Art. 41 (2) (d). The court found that the limitation did not meet the threshold laid out in Article 24 (2) (c) which touches on the nature and extent of limiting a right.

The petition was dismissed on other grounds. However, the Court held that Sec. 81 (3) was inconsistent with the constitutional provisions on the right to strike and was of the view that the legislature needs to relook the provision and align it with the Constitution.

IV Minimum Services Agreement: The Less Restrictive Means to Achieve The Purpose of Prohibiting the right to Strike for Workers in Essential Services

There is indeed a less restrictive means through which the purpose of this limitation can be achieved. Instead of a total prohibition of strikes for all workers in an essential service, a maintenance of limited staff of workers to provide minimum services to the public in an effort to prevent harm to life, safety and health of the population may be negotiated.[47] These workers

[47] Gernigo B, Odero A and Guido H, ILO Principles Concerning the Right to Strike, (ILO Geneva 2000) available at*http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_087987.pdf*. accessed on 25 September 2018.

providing the minimum services will be the only ones prohibited from striking. The other workers engaged in the wider essential service are then allowed to exercise their right to strike without occasioning great harm to the consumers of the services offered.

The two parties, employer and employees, have to negotiate and conclude a minimum services agreement through which these terms and conditions are agreed upon. This agreement is a collective agreement which provides for the maintenance of minimum services in an essential service as a prerequisite to the exercise of the right to strike by the workers.[48] The use of Minimum Services agreements for workers in essential services is an approach which Kenya can borrow from South Africa.

V Minimum Services Agreements: The South African Approach

South Africa is one of the few African countries which provides for minimum services agreements as part of its labour law to ameliorate the limitation of the right to strike for workers in essential services.[49] Its Labour Relations Act provides for the entering of minimum services agreements between the workers and their employers in essential services. Minimum services, though previously not defined in the principal Act, may be inferred to refer to services which are adequate to ensure that during an industrial action, no harm is occasioned to one's life, personal safety or health. The South Africa's Labour Relations Amendment Bill of 2017 proposed a definition[50] to the extent that a 'ratified minimum service' or a 'determined minimum service' should mean the minimum number of employees in a designated essential service who may not strike in order to ensure that the life, personal safety or health of the whole or part of the population is not

[48] Labour Relations Act of South Africa 1995 s. 72.

[49] A Jacobs, 'The Law of Strikes and Lock-outs' in R Blainpain (ed) *Comparative Labour Law and Industrial Relations in Industrialized Market Economies* (2010) (44-46).

[50] Hogan Lovells Publications, Employment News Letter 'Change is as good as the 2017 LRA Amendments' available at*https://www.hogan.lovells.com/en/publications/the-2017-lra-amendments*, accessed on 3 October 2018.

endangered.[51]What constitutes a minimum service varies from each sector and is a matter which requires the consent of both parties. The minimum services agreed upon are to be regarded as the essential service by the employer and employee.[52]

Through a minimum service system, the Government can ensure that the consumers' basic needs are met and facilities continue to operate without disruption.[53] A service must meet a two-fold criteria to be considered as minimum. First, it should 'genuinely and exclusively be a minimum service'[54] This means that it must be restricted to functions which are necessary to meet the basic needs of the public at large. Secondly, the employees' organization should be part and parcel of the defining process as to what constitutes minimum services as their bargaining power has already been limited.[55]

In a minimum services agreement, the parties should take into account factors such as the instances in which the service can be interrupted without grave danger to the life, health or personal safety of people, the duration of striking by workers in the service, which parts of the service should be considered as basic and minimum to require their provision during a strike, the categories of workers who should provide the minimum services and the number of these employees.[56]

Where there is contention at to what constitutes a minimum service in any essential employment, such a dispute should be settled by an independent body. The minimum services agreement can therefore be regarded as a tool

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[51] South Africa's Labour Relations Amendment Bill 2017 available at*https://www.parliament.gov.za/storage/app/media/Docs/bill/927d3cbc-ec26-4a68-82f3-438b6d815fd3.pdf*, accessed on 3 October 2018.

[52] Labour Relations Act of South Africa, 1995 s. 72 (a).

[53] ILO: Freedom of Association and Collective Bargaining (General Survey by the Committee of Experts on the Application of Conventions and Recommendations), International Labour Conference, 81st Session, 1994, Report III (Part 4B).

[54] Ibid, (162).

[55] Ibid.

[56] Dhaya Pillay, Essential Services: Developing Tools for Minimum Service Agreements, ILJ (2012) 801.

to balance the right of essential workers to strike and the right of the consumers at large to access the essential services. It serves as an alternative or a compromise as it were to the exercise of the right to strike by this particular group of workers. This mechanism meets the threshold of a less restrictive means to achieve the purpose of limiting the right to strike of workers' in essential services.

VI Recommendations: Lessons Kenya can Borrow from South Africa

The Kenyan approach to the extent of limiting the right to strike for workers in essential services differs from that of South Africa. Kenya's Labour law provides for an absolute prohibition of this right for those engaged in a service determined to be essential.[57] This is different from the South African context where workers in essential services may still exercise their right to strike on condition of a ratification of a minimum services agreement with their employers.[58] Kenya does not envision this exception in its legal framework for labour.

The absolute prohibition, apart from being an unnecessary infringement of the workers' right to strike, has not deterred Kenyan workers in essential services from downing their tools. Kenya has most recently and in the past experienced protracted strikes particularly in its health sector which is an essential service.[59] In this regard, South Africa is a step ahead of Kenya in ensuring there is a balance between the right to strike and the need to avail essential services for the protection of the life, personal safety and health of the public. An absolute prohibition of the workers' right to strike as in the Kenyan context only fuels the frustration levels of these workers particularly where there are inadequate mechanisms for redressing the disputes which may arise in their employment relationship.

[57] S. 81 (3) of Kenya's Labour Relations Act states that 'There shall be no strike or lock-out in an essential service.'

[58]Lovemore Madhuku, The Right to Strike in Southern Africa, Int'l Lab. Rev. (1997) 509.

[59] Nasibo Kabale 'Doctors' Strikes cripples services at Kenya National Hospital'available at https://www.standardmedia.co.ke/article/2001275767/doctors-strike-cripples-services-at-kenyatta-national-hospital, accessed on 5 October 2018.

Kenya should consider adopting the South African system of concluding minimum services agreements between workers and employers in essential services. This move should be informed by the pivotal role that the right of workers to strike plays in labour law and the need to ensure its accessibility to most if not all workers in essential services.

Kenya through its legislature should put in place a comprehensive legal and policy framework that will address the state of workers in essential services and secure their rights.

The Labour Relations Act should also be modified to ensure its alignment with the Constitution. Its absolute prohibition of the right to strike for workers in essential services goes against the constitutional right to strike as was noted in *Okiya Omtatah Okoiti v AG & 5 Others.* The provision should be considered null and void to the extent of its inconsistency.[60]

In Kenya, the process of designating a service as essential legally is not as comprehensive and inclusive of all relevant stakeholders as is the case in South Africa. This mandate in Kenya is left to the Minister who must only consult with the National Labour Board. The employers or employees in the services which may be proposed as essential are not involved in the process. However in South Africa, the body obligated with this designation is required to consult widely and all relevant stakeholders including the public in general can participate in the process.

The Essential Services Committee which is created under South Africa's Labour Relations Act, is tasked with the determination as to whether any other service should be categorized as essential.[61] The committee in carrying out this function must give a notice in the *Government Gazette* of any investigations it undertakes as to whether a part or the whole of a service is essential.[62] The notice should include the specific service which is to be

[60] Constitution of Kenya, 2010 Article 2 (4)
[61] Labour Relations Act of South Africa 1995.
[62] Ibid, s 71 (1).

subject of the investigation and invite interested parties within a specified period to make written or oral representations before the committee.[63]

The interested parties are granted opportunity to inspect the written representations which have been submitted and are to be provided with a certified copy of these representations upon payment of the required fee.[64] The committee must consider the written and oral representations of the parties and thereafter determine whether the part or whole of the service should be designated as essential.[65]A notice of any such designation must then be published in the *Government Gazette.*[66]

VII Conclusion

Kenya acknowledges the significance of the right to strike as is evident by the inclusion of this right in its bill of rights. However, the absolute prohibition of this right for workers in essential services needs to be addressed. It is possible to have a balance between the need to ensure availability of essential services and the need to protect the right to strike for workers in the essential services. The adoption of the minimum services agreements is the mechanism through which this balance can be met and the right to strike for workers' in essential services in Kenya revived.

[63] Ibid, s 71 (2).
[64] Ibid, s 71 (3) and (4).
[65] Ibid, s 71 (7).
[66] Ibid, s 71 (8).

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Online Dispute Resolution: The Future of E-Commerce in Kenya

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Abstract

This paper finds that the E-commerce market has drastically developed with the advancement of technology. Our locally produced goods and services are now available online at any part of the world. Thus, technology and e-commerce are joined to the hip. Our Kenyan e-commerce market is a crucial contributor to the economy owing to its sizeable contribution to the Gross Domestic Product. Notably, both e-commerce and online dispute resolution are products of technology. It is not in doubt that almost every sector of the economy has embraced technology to enhance ease of doing business, effective resolution of e-commerce disputes, reach a global market audience for profitability, and promote free flow of products and services.

Introduction

Online Dispute Resolution (ODR) has significantly developed through interventions made by individual dispute resolvers to administer justice to claims arising in e-commerce.[1] It has piqued the interest of global enterprises and online consumers for being an out-of-court method which embraces the internet in dispute resolution.[2] There is no single or universally agreed definition of ODR. In broad terms, ODR means the emerging and

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[1] Alexandra Akinyi Ochieng & Bernard M. Nyaga, "*Facilitating Access to Justice through Online Dispute Resolution in Kenya*," (2022) 10 (1) Alternative Dispute Resolution (ISBN 978-9966-046-14-7), the Chartered Institute of Arbitrators-Kenya Journal pg. 110-131

[2] Ethan Katsh, 'Online Dispute Resolution: Some Implications for the Emergence of Law in Cyberspace' (2006) 10 Lex Electronica

revolutionary dispute resolution mechanism which develops with the progress of technology.[3]

Online Dispute Resolution has morphed like the proverbial mustard seed to promote a dispute free e-commerce environment. It is a distinct method of Alternative Dispute Resolution (ADR) which involves the resolution of disputes as a result of online conduct[4] and through the internet.[5] However, it is faced with the disadvantage of concentration of internet in the urban areas, lack of awareness, inaccessibility in rural areas and the absence of an enabling legal regime.

I. The Intersection of Online Dispute Resolution and E-Commerce

Online resolution is also called Internet Dispute Resolution (IDR), or Electronic Dispute Resolution (EDR), or Electronic ADR (eADR) and Online ADR (oADR).[6] We shall evaluate the intellectual divide caused by these emerging tactic of conflict management through technology. Our findings will demonstrate that the case for online dispute resolution outweighs the case against online dispute resolution. To demonstrate the usefulness of this debate, maximum legislative, financial and institutional resources should be directed towards its full realization in Kenya's e-commerce space.

In Kenya, Online Dispute Resolution lacks a statutory definition. Neither have the courts given an interpretation of ODR or contemplated its usefulness contrary to the Constitutional spirit of access to justice embodied in Article 48.[7] For these reasons, an elaborate legislation akin to the

[3] Feliksas Petrauskas and Eglė Kybartienė (2011), 'Online Dispute Resolution in Consumer Disputes' 18 Jurisprudence 921, 922
[4] Gralf-Peter G (2003), 'Online Dispute Resolution: Consumer Redress in Global Market place.' Vol 7 No.8 German Law Journal 647 at p. 651
[5] Rafal M. (2005), 'Regulation of Online Dispute Resolution: Between Law and Technology.' Available at :http://www.odr.info/cyberweek/Regulation%20%of20ODR_Rafal%20Morek.doc (Last visited on 5th June, 2021)
[6] Ibid at 922
[7] Constitution of Kenya (2010), Article 48

Arbitration Act should enacted to give a clear and express definition,[8] to provide for E-Commerce development as an objective of ODR and to establish a corresponding financially-enabled institution to streamline its operation in Kenya.

Electronic commerce is referred to as a 'giant boundless market place'.[9] Online businesses are able to reach their prospective clients at the click of a button. The Internet has provided immense marketing and communication opportunities for such businesses hence negating the barriers presented by language, culture, time and location.[10]

Online Dispute Resolution is primarily concerned with but not limited to low-value claims such as defective products, an overcharge, false advertisement and delays in delivery. At the comfort of your home, you can easily source or import products. The internet has become the world's biggest frontier in commercial transactions such that parties can use the various legal remedies to enforce contractual rights.[11]

Increased use of technology, especially in Nairobi, Mombasa, Kisumu and Nakuru Cities, has shown their corresponding ability to improve resolution of disputes. The disputes within the e-commerce space are directly compatible with Online Dispute Resolution as opposed to the traditional court systems. However, the biggest challenge is that Kenyan legislative structures have not engaged writers and researchers of law to study reform of ODR to basically address the locally prevailing conditions. An

[8] See the Arbitration Act No.4 of 1995

[9] Maxime Hanriot, "Online Dispute Resolution (ODR) As a solution to Cross-Border Disputes: The Enforcement of Outcomes," (2015-2016) Vol 2,1 McGill Journal of Dispute Resolution

[10] Alex Assenga Githara, "Embracing Technology – Powered Alternative Dispute Resolution (ADR) in a Post Pandemic Africa: A Catalyst for Change in the E-commerce, Trade and Justice sectors," (2021) 9 (4) Alternative Dispute Resolution (ISBN 978-9966-046-14-7), the Chartered Institute of Arbitrators-Kenya Journal pg. 189

[11] Peel, E. and Treitel, G., (2015), "The Law of Contract," 14th ed. London: Sweet & Maxwell/Thomson Reuters, para 1-1001

empowered ODR is the way to go through a supportive sector-specific law with substantive remedies to aggrieved customers.

II. The Case For Online Dispute Resolution

The Constitution of Kenya promotes the use of alternative forms of dispute resolution in Article 159 (2) (c).[12] It gives the ordinary *mwananchi* a wide array of choices ranging from reconciliation, mediation, arbitration and traditional dispute resolution mechanisms.[13] Online Dispute Resolution is not any indifferent. Rather it is modelled on these forms and more diverse hence the use of online negotiation, online mediation, online conciliation, online mediation and online arbitration.[14]

The right to access the various forms of ADR including Online Dispute Resolution draws in the three arms of Government. First, the Constitution states that courts and tribunals are vested with judicial authority to dispense justice to Kenyans.[15] The efforts by the judiciary to roll out party-initiated conflict management mechanisms through ADR and TDRMs, including the launch of Judiciary Social Transformation on Access to Justice, has nevertheless not led to the realization of the impetus of ODR.[16]

Online Dispute Resolution (ODR) is a form of alternative dispute resolution which utilizes the internet to bring about efficient resolution of disputes. Just as other types of ADR, it upholds the attributes of voluntariness, confidentiality and party autonomy.[17] Some unique features of ODR include its efficiency of resolving disputes through the use of technology, it bypasses the limitations of the courts, not bounded by time or location restrictions, and

[12] Constitution of Kenya, Article 159 (2) (c)
[13] Ibid
[14] Ochieng, A. and Nyaga, B.M, Supra Note 1, at 117
[15] The Constitution of Kenya, Article 159 (1)
[16] Judiciary of Kenya, " Alternative Justice Systems Policy Framework," (Judiciary 2020), vii
[17] K. Muigua, "Making Mediation Work for All: Understanding the Mediation Process," (kmco.co.ke) available at: *http://kmco.co.ke/wp-content/uploads/2018/08/Making-Mediation-Work-for-all-Understanding-the-Mediation-Process-August-2018-1.pdf* Access date: 5th May 2021

its complementary nature to Traditional Dispute Resolution Mechanisms as shown below.[18]

ODR is primarily concerned with cyberspace or internet disputes. This is largely attributed to the advancement of technology and its penetration in Kenya through inter alia electronic commercial transactions. It utilizes Information Technology which is tailored to outweigh geographical challenges that may arise between the parties and facilitate expeditious resolution of disputes by saving time and related costs.[19]

a. Shock Absorber for COVID-19 Pandemic

ODR is the most resilient system of informal justice as it has not only navigated barriers presented by location and time indifference but also dodged the ripple effect that the pandemic had in the provision of justice through the conventional court system.[20]

COVID-19 pandemic may have taken a toll on humanity by affecting the way we interact with one another due to lockdown measures, restriction of travel, emphasis on social distancing and reduced physical contact amongst people.[21] Contrary to a misinformed popular belief, the pandemic came as a blessing in disguise. Instead, most Kenyan enterprises opted for a full or partial departure from the brick and mortar set up of doing business. The relaxation of COVID-19 containment measures is another big boost to the use of Alternative Dispute Resolution in Kenya. Entry of Kenyan business

[18] Muigua K., "Traditional Dispute Resolution Mechanisms under Article 159 of the Constitution of Kenya 2010," p.6

[19] Sara Parker, 'Online Dispute Resolution (ODR) and New Immigrants: A Scoping Review' (British Columbia Ministry of Labour, Citizens' Services and Open Government 2010) 7

[20] Bernard Nyaga, "Succession rows can overwhelm our courts," The Standard, 5 January 2021 *<https://www.google.com/url?sa=t&source=web&rct=j&url=https://www.standardmedia.co.ke/amp/opinion/article/2001399146/succession-rows-can-overwhelm-ourcourts&ved=2ahUKEwissrmEi8PuAhWJUBUIHU52DRQQFjAAegQIAxAC&usg=AOvVaw16tN4jXd4oo7KvHI3z8K9Y>* Access date: 5th May 2022

[21] Bernard, "Total Lockdown sure way out of Covid-19 threat" The Standard, 30 May 2020

into the online space has had its fair share of challenges owing to disputes which can be easily remedied by supportive legislation on Online Dispute Resolution and allocation of funds for maximum enhancement.

b. Informal resolution

Internet disputes are best resolved through Online Dispute Resolution as opposed to litigation or any other method of ADR.[22] There is no involvement of courts. The Kenyan law has failed to interpret the enforcement of decisions obtained by ODR. This makes the process reliant or dependent on the judiciary to derive its authority.

Neither has it conducted awareness of it nor employed enough personnel to assist parties who prefer ODR to litigation. This should present job and employment opportunities to Kenyan accomplished dispute resolution practitioners. It will also benefit the person seeking their services in the promotion of access to Justice. The state must in the resources to ensure the meeting of such purposes.[23] Most jurisdictions lack regulation on cross-border electronic commerce (e-commerce) transactions. As a result, lack of regulation hinders the role of the courts in the litigation of online disputes with the effect of depriving a consumer efficient redress whenever such disputes arise.[24]

c. Not bounded by limitations

ODR has not only proved effective in facilitating internet disputes but also offline conflicts. Further ODR is not limited to exclusively online processes. ODR platforms are accessible to a party even without internet connectivity through a computer or any other technological device.[25] Online Dispute Resolution is a distinct form of Alternative Dispute Resolution. Its

[22] Naomi Creutzfeldt, "The Origins and Evolution of Consumer Dispute Resolution Systems in Europe" in Christopher Hodges & Adeline Stadler, eds, Resolving Mass Disputes: ADR and Settlement of Mass Claims (Cheltham: Edward Elgar, 2013) 223 at 235

[23] Constitution of Kenya, Article 20.5

[24] Pablo Cortès, 'Online Dispute Resolution for Consumers in the European Union' (New York: Routledge, 2010) at 10

[25] Sascha Ossowksi (ed), 'Agreement Technologies, Law Governance and Technology Series,' vol 8 (Springer 2013)

technological approach to dispute resolution differs from the other methods of dispute resolution. Technology has demonstrated more potential in the resolution of disputes as opposed to traditional ADR due to its convenient nature.[26]

d. Complementary nature to traditional informal justice systems

Despite being a distinct form of ADR, ODR is said to have emanated from Traditional Dispute Resolution Mechanisms (TDRMs).[27] ODR resolves disputes in the cyberspace through the various ADR methods.[28] Traditional Dispute Resolution mechanisms is one of those methods used in enhancing the effectiveness of ODR. It refers to the use of Information Technology to facilitate resolution of disputes through TDRMs in the cyberspace.[29]

Advantages of Online Dispute Resolution

a. Reduces the burden of distance

This method of dispute resolution is particularly convenient to parties who are distant from one another unlike other methods of ADR. It saves on travelling costs and also reducing on the burden associated with travel to attend in-person meetings. Instead, parties communicate to each other through the internet in ODR regardless of one's location to facilitate the resolution of a dispute.[30] Technology shortens the distance making ODR

[26] Orna Rabinovich-Einy and Ethan Katsh, 'Digital Justice: Reshaping Boundaries in an Online Dispute Resolution Environment' (2014) 1 International Journal of Online Dispute Resolution 5

[27] Nwandem Osinachi Victor L. , 'Online Dispute Resolution: Scope and Matters arising' available at: SSRN-id2592926(1).pdf Access date: 8th June 2021

[28] Van den Heuvel E. 'Online Dispute Resolution as a Solution to Cross-border E-disputes: An Introduction to ODR' (2002) Available at http://www/oecd.org/dataoecd/63/57/1878940.pdf access date 8th June, 2021

[29] Arun R. 2007, 'The Legal Challenges Facing Online Dispute Resolution: An Overview' Available at http://www.galexia.com/public/research/articles/research_articles-art42.html Access date: 8th June, 2021

[30] Bernard M. Nyaga, "2021), "*Crypto Rising Interest in Kenya: Arbitration Cutting the Mustard in Smart Contracts*," in the YMG ADR Bulletin October 2021 Issue Vol No. 14 available at: www.ciarbkenya.org/ymg Access date: 5th May 2022

faster than a typical trial or any other method of ADR which may require the parties to travel to make a physical appearance.[31]

b. Affordable

Resolving disputes in the cyberspace through ODR is less costly and affordable. In ODR, for instance, one doesn't have to incur costs associated to hiring a legal practitioner.[32] Travel and space hiring costs are also eliminated by ODR as the platform for dispute resolution is the internet.

c. Accessibility

ODR platforms provide a guarantee that they are accessible to the parties. Most ODR providers are available round the clock: twenty fours a day and seven days a week.[33] Thus, disputants in ODR are not tied down to delays associated with the resolution of the dispute.[34] Similarly, the parties are afforded a chance to select their neutral aid parties availed on an ODR website for the purposes of an online mediation or arbitration.

d. Speed

It is also enables the resolution of a dispute in a timely, speedy and expeditious manner. The process can be completed after a few days as opposed to litigation which may take months to decide on various cases.[35]

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[31] Pappas B.A, (2008), 'Online Court: Online Dispute Resolution and The Future of Small Claims.' UCLA Journal of Law and Technology Volume 12, issue 2. p.6 Available at www.lawtechjournal.com Access date: 8th June, 2021

[32] Hang L.Q., 2001, Online Dispute Resolution Systems: The Future of Cyberspace Law; Santa Clara law Review, vol. 41: No.31 Article 4, p.855. Available at http://digitalcommons.law.scu.edu/lawreveiw/vol41/iss3/4 Access date: 8th June, 2021

[33] Nwandem Osinachi Victor L., Supra note 19

[34] Hang L.Q. (2001), 'Online Dispute Resolution Systems: The Future of Cyberspace Law'; Santa Clara law Review, vol. 41: No.31 Article 4, p.354-355. Available at http://digitalcommons.law.scu.edu/lawreveiw/vol41/iss3/4 Access date: 8th June, 2021

[35] Internet-ARBitration: "Benefits of Online Arbitration". Available on www.netarb.com/arbitration_articles/article.php Access date: 8th June, 2021

e. Maximizes Benefit

ODR is credited for encouraging International trade since the internet has bypassed the challenges of time zone restrictions, language barrier and tedious physical meetings in the traditional ADR.[36]

III. The Case Against Online Dispute Resolution

As alluded to earlier, its benefits outweigh its shortcomings for the reasons occurrence require reform to give Online Dispute Resolution the much needed breathe. Its full operationalization is hindered by the lack of a robust legislative framework and insufficient funds. Activity during ODR processes are limited by coaching of witnesses hence of lack of credibility, inaccessibility of online technologies, associated expenses, compliance with the final outcome and unpredictability.[37]

Despite ODR being convenient, flexible, accessible, expeditious and encouraging International trade, it lacks face-to-face contact. [38] ODR websites are said to be impersonal as they only provide for virtual settlement of disputes which prevents the use of non-verbal communication.[39] The use of technology eliminates the advantage of physical contact in ADR where 'parties to vent their feelings in a more formal setting and are able to directly relate to the grievance sought and the loss suffered.'[40] The lack of face-to-face contact does not establish trust and confidence in the parties of the online dispute procedure.[41]

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[36] Ibid
[37] Ibid
[38] Hang L.Q. (2001), Supra note, at pg. 857
[39] Joseph W Goodman, 'The Pros and Cons of Online Dispute Resolution: An Assessment of Cyber-Mediation Websites' (2003) 2 Duke Law & Technology Review 1
[40] Katsh, E., (2000), 'The new Frontier: Online ADR becoming a global priority,' Dispute Resolution Magazine, p.8 available at www.umass.edu/cyber/katsh_aba.pdf Access date: 8th June, 2021
[41] Hornle, J., 2002, ODR in Business to Consumer e-commerce Transactions. Journal of information Law and Technology, No.2. p.31 Available at http://www2.warwick.ac.uk/fac/soc/law/elj/ Access date: 8th June, 2021

However, the use of video conferencing is used in ODR has been used to mitigate this shortcoming. It facilitates verbal and non-verbal communication and, ensures that parties are satisfied with the settlement offered. This however required online dispute resolution experts to adopt communication skills in a screen to screen interaction scenario.[42]

ODR may be mired by ethical malpractices in technology such as hacking of ODR websites affecting the confidentiality of its processes.[43] ODR, being an ADR mechanism, must protect the confidentiality of its processes to encourage the parties to speak freely without being intimidated.[44] One way in which ODR can guarantee confidentiality to the parties is by using digital signatures to enhance trust and confidence in the authenticity its processes.[45] Data Protection Act.

Lack of security of the information provided by the parties has far-reaching effects to the confidentiality of an ODR process and consumer reluctance to the method. Another method is enacting laws prohibiting and criminalizing hacking such as the US Digital Millennium Copyright Act of 1998. Electronic file management can also be used as an alternative to emails in processing and storing documents pertaining to a case in a systematic order electronically. [46]

IV. Structuring Online Dispute Resolution in E-Commerce

It is classified into Synchronous and Asynchronous modes of Online Dispute Resolution.[47] Synchronous ODR involves online communication through chat messaging, video or audio conferencing while Asynchronous ODR is the communication that may take place remotely through email or text.[48]

[42] Manevy I, 2001, Online dispute resolution: What future? P.8. Available at http://ithoumyre.chez.com/uni/mem/17/odr01pdf. Access date:8th June, 2021
[43] Daniel Rainey, 'Third-Party Ethics in the Age of the Fourth Party' (2014) 1 International Journal of Online Dispute Resolution 37
[44] Katsh E., (1995) Dispute Resolution in Cyberspace, 28 CONN. L. REV. p. 971
[45] Nwandem Osinachi Victor L., Supra note 13 at Pg. 12
[46] Hornle J. (2002), Supra Note 25, pg. 4
[47] Richard M. Victorio, "Internet Dispute Resolution (IDR): Bringing ADR into the 21st Century," (2001) pg. 289
[48] Ibid, 289

Actually among the first cases of ODR in the United States was the online mediation procedures conducted via e-mail and a settlement reached.[49] By the end of the 20th Century, United States had established various systems of ODR including eBay, SquareTrade and CyberSettle.[50]

As demonstrated, communication is an essential feature of Online Dispute Resolution. For a dispute to be resolved, parties must be willing. Secondly, they must sort out their issues through outright exchange of information about the present dispute to create a way forward. ODR plays many roles in the resolution of disputes in the cyberspace. It is mainly used in disputes arising from electronic commerce, offline cross-border transactions and domain names.[51] Cross-border transactions however face jurisdictional challenges and low internet connectivity.[52] ODR can also be extended to cover family disputes through online mediation.[53]

Integration of Online Dispute Resolution in E-Commerce

Online Dispute Resolution is a form of alternative dispute resolution which is best suited for e-commerce and related claims. E-commerce, unlike brick & mortal business transactions is efficient, accessible, saves time, convenient and cost-saving.[54] The application of technology has enabled commercial transactions in the cyber space. And since disputes are inevitable

[49] Katsh E. & Rifkin J. (2001), " Online Dispute Resolution: Resolving Conflicts in the Cyberspace ," Hobokken: Wiley

[50] Lodder A. R. & Zeleznikow J. (2010), "Enhanced Dispute Resolution through use of Information technology

[51] Feliksas Petrauskas and Eglė Kybartienė, 'Online Dispute Resolution in Consumer Disputes' (2011) 18 Jurisprudence 921, 922

[52] Lee A Bygrave, 'Online Dispute Resolution – What It Means for Consumers', Domain Name Systems and Internet Governance (Baker & McKenzie Cyberspace Law and Policy Centre and the Continuing Legal Education programme of University of NSW 2002) 1

[53] Tania Sourdin and Chinthaka Liyanage, 'The Promise and Reality of Online Dispute Resolution in Australia' in Mohamed Abdel Wahab, Ethan Katsh and Daniel Rainey (eds), Online Dispute Resolution Theory and Practice (Eleven International Publishing 2013) 494

[54]Kariuki, Supra note 2 at 2

in any commercial transaction, e-commerce may lead to e-disputes which are best resolved through Online Dispute Resolution.[55]

It concerns itself with the resolution of low-value Business-to-Consumer (B2C) e-commerce disputes. The nature of B2C and C2C e-commerce disputes allows the use of ODR as they consist low value straightforward claims.[56] They may arise owing to the volume in which electronic commerce is conducted and geographical indifference between the supplier and the consumer. [57] In 2010, ODR through the use of technology in the eBbay/Paypal procedure resolved over 60 million E-Commerce disputes without human intervention.[58]

ODR developed as part of e-commerce.[59] It is the most convenient form of dispute resolution in E-commerce transactions. There are various E-commerce platforms through which an online business transaction may be conducted, they may include Business-to-Consumer (B2C), Business-to-Business (B2B), Consumer-to-Business (C2B), Consumer-to-Consumer (C2C) and Government-to-Citizen (G2C) e-commerce transactions.[60] On the one hand, B2C and B2B e-commerce models involve electronic commercial

[55]Thompson D. 2014, "The Growth of Online Dispute Resolution of and the Use in British Colombia," available at: https://www.cle.bc.ca/PracticePoints/Lit/14-GrowthODR.pdf Accessed 22/05/2021

[56] Louis F Del Duca, Colin Rule and Brian Cressman, 'Lessons and Best Practices for Designers of Fast Track, Low Value, High Volume Global E-Commerce ODR Systems' (2015) 4 Penn State Journal of Law & International Affairs 242

[57] Julia Salasky, 'Jurisdiction, Sovereignty, and the Creation of a Global System for Online Dispute Resolution' (2015) 1 The Journal of Technology and International Arbitration 3 – 34

[58]Nancy H Rogers et al, Designing Systems and Processes for Managing Disputes (New York: Aspen Publishers, 2013) at 24

[59] Kananke Chinthaka Liyanage, 'The Regulation of Online Dispute Resolution: Effectiveness of Online Consumer Protection Guidelines' (2012) 17 Deakin Law Review 251

[60]Rania Nemat, 'Taking a Look at Different Types of E-Commerce' (2011) 1 World Applied Programming 100, 100 – 103; Parag Shiralkar, 'Digital Signature: Application Development Trends In E-Business' (2003) 4 Journal of Electronic Commerce Research 94

transactions where a business transfers a good or service to the consumer and E-Commerce transactions between two businesses respectively.

ODR is the most convenient form of dispute resolution in E-Commerce transactions provided that the disputing parties have access to internet and telecommunication. It is considered an online extension of the Alternative Dispute Resolution (ADR) mechanisms.[61]

Domain names

Online Dispute Resolution provides the platform in which cross-border domain name and Intellectual Property disputes are amicably settled and binding upon the parties.[62] A complainant to the applicable provider is required to prove that his/her/its domain name is identical to a trademark that the respondent has asserted rights, that he/she has no rights in respect of the domain name and has been registered and is being used in bad faith.[63]

In the ODR Case of *UEFA v Funzi Furniture*, the complainant had filed a claim against the respondent for registering the 'www.championsleague.com' domain name before an administrative panel of the World Intellectual Property Organization (WIPO) Arbitration and Mediation Centre.[64] It was held that the respondent had no rights or legitimate interest in the domain name.[65]

There are various systems of Online Dispute Resolution which have been established to foster resolution of e-disputes that may arise due to allocation of domain names. The systems may include the Internet Corporation for

[61] Kallel S, 'Online Arbitration', 25 Journal of International Arbitration (2008), 345
[62] Aashit Shah, 'Using ADR to Resolve Online Disputes' (2004) 10 Richmond Journal of Law and Technology https://jolt.richmond.edu/vl013/article25.pdf accessed 17 November 2015
[63] The ICANN Uniform Dispute Resolution Policy, Rule 4
[64] Union des Associations Europeennes de Football (UEFA) v Funzi Furniture [2000] WIPO Arbitration and Mediation Center WIPO Domain Name Decision: D2000-0710.
[65] Ibid

Assigned names and Numbers Application (ICANN)[66] for the resolution of disputes arising from domain names through the ICANN Domain Name Dispute Resolution Policy (UDRP).[67]

V. Legal Framework of Online Dispute Resolution in Kenya

This part of this paper evaluates the legal framework of ODR in Kenya while contrasting it with the United Kingdom and the United States. Kenya lacks a stable legal framework on Online Dispute Resolution (ODR).[68] The absence of a clear and definite legal framework has hindered the development and reduced the consumer confidence of B2C e-commerce in Kenya.[69] The regulation of ODR will not only facilitate the efficiency of E-Commerce [70] but also increasing consumer confidence [71] in online commercial transactions.

Importance of Regulation of ODR

ODR is not expressly regulated by Regional and International instruments.[72] It is largely regulated by soft law through guidelines and recommendations due to the lack of adequate provisions in hard law.[73] In 2010, the United

[66] Internet Corporation for Assigned Names and Numbers (ICANN) available online: https://www.icann.org/

[67] ICANN, Uniform Domain Name Dispute Resolution Policy (1999) available online at https://www.icann.org/resources/pages/policy-2012-02-25-en

[68] Sodiq O Omoola and Umar A. Oseni, 'Towards an Effective Legal Framework for Online Dispute Resolution in E-Commerce Transactions: Trends, Traditions, and Transitions' (2016) 24 International Islamic University of Malaysia Law Journal 274

[69] Fahimeh Abedi and John Zeleznikow, 'The Provision of Trustworthy Online Dispute Resolution for Business to Consumer Electronic Disputes', Proceedings of 7th Asia-Pacific Business Research Conference (2014)

[70] Felix Steffek and others, 'Guide for Regulating Dispute Resolution (GRDR): Principles and Comments' in Felix Steffek and others (eds), Regulating Dispute Resolution – ADR and Access to Justice at the Crossroads (Hart Publishing 2013) 18

[71] Karolina Mania, 'Online Dispute Resolution: The Future of Justice' (2015) 1 International Comparative Jurisprudence 76, 85.

[72] Lee A Bygrave, 'Online Dispute Resolution – What It Means for Consumers', Domain Name Systems and Internet Governance (Baker & McKenzie Cyberspace Law and Policy Centre and the Continuing Legal Education programme of University of NSW 2002) 1

[73] Ibid

Nations Commission on International Trade Law (UNCITRAL) established 'Working Group III' which developed rules for the regulation of Cross-border ODR disputes and in 2016 adopted the 'Technical Notes on Online Dispute Resolution of the United Nations Commission on International Trade Law.[74]

The need for regulation is also supported by the advances made in technology and internet connectivity. Developed countries such as United Kingdom and the United States have developed systems that enable high quality internet connectivity as compared to developing countries such as Kenya.[75] The use of high speed internet networks in these countries has been accelerated by high disposable income hence increase in E-Commerce activities.[76] The level of internet use in Kenya has been progressive but remains relatively low. However, the rise of B2C E-Commerce disputes require a stable legal framework for ODR to operate.

Laws concerning the use of ODR in Kenya

1. **The Constitution of Kenya, 2010**

Disputes arising from B2C Commerce can be resolved either through litigation under the Civil Procedure Act and Civil Procedure Rules or the use of Alternative Dispute Resolution (ADR).[77] The Constitution of Kenya, under Article 159, states that courts in the exercise of judicial authority shall promote the alternative forms of dispute resolution including, Reconciliation, Mediation, Arbitration and Traditional Dispute Resolution mechanisms.[78] Though ODR is not expressly provided for as an alternative

[74] NCTDR, available at: http://odr.info/uncitral-cross-border-odr/- accessed on 25th May, 2021
[75] Angela Kaguara and Maureen Wanjiru, 'Digital Divide: The Glaring Reality' (University of Nairobi 2009) 7,8
[76] Luis Enriquez and others, 'Creating the Next Wave of Economic Growth with Inclusive Internet' (World Economic Forum 2015)
[77] Feliksas Petrauskas and Eglė Kybartienė, 'Online Dispute Resolution in Consumer Disputes' (2011) 18 Jurisprudence 921, 922
[78] Article 159 (2) (c), Constitution of Kenya, 2010

form of dispute, it can be inferred as is considered an online extension of ADR Mechanisms.[79]

2. The Consumer Protection Act

However, the use of Alternative Dispute Resolution in e-commerce disputes may be limited. Section 88 of the Consumer Act affects the operation of ODR and to a large extent, Alternative forms of dispute resolution. It states that, 'Any term or acknowledgment in a consumer agreement or a related agreement that requires or has the effect of requiring that disputes arising out of the consumer agreement be submitted to arbitration is invalid insofar as it prevents a consumer from exercising a right to commence an action in the High Court given under this Act.'[80] This provision limits the operation of ADR in e-commerce disputes since it allows a consumer to abandon an arbitral clause and commence an action in the High Court.

3. Kenya Information and Communication Act

It entitles a consumer vide the Kenya Information and Communication (Dispute Resolution) Regulations to file a complaint against a telecommunications provider in a B2C E-Commerce with the Communications authority of Kenya.[81]

Regulation of ODR in the United Kingdom

The United Kingdom provides for the regulation of Online Dispute Resolution. It has express provisions on ODR that promote consumer protection, enhance the efficiency of e-commerce and improve consumer confidence.[82]

UK has fully embraced the use of ODR through its court system an alternative to resolving disputes through the internet. Lord Justice Briggs, for instance, enumerated the need for the establishment and regulation of

[79] Supra note 14
[80] Section 88 (1) of the Consumer Protection Act, 2012
[81] Kenya Information and Communication Act 2019
[82] Jacob K Gakeri, 'Placing Kenya on the Global Platform: An Evaluation of the Legal Framework on Arbitration and ADR' (2011) 1 International Journal of Humanities and Social Science 227 accessed 28 September 2016

ODR in the UK Judiciary due to 'the presence of efficiency, lowered costs and ease of access to public.'[83] He further propounded that it should be limited to monetary claims.[84]

It has adopted the Alternative Dispute Resolution for Consumer Disputes (Amendment) Regulations 2015 of the European Union (EU). The regulation states that ODR is a simple, efficient, affordable and out of court resolution for disputes arising from online transactions.[85] The regulation on Consumer ODR also alludes to the fact that there is lack of mechanisms that facilitate resolution of such disputes to the 'customer detriment, acts as a barrier, in particular, to cross-border online transactions, and creates an uneven playing field for traders, and thus hampers the overall development of online commerce.'

The Regulation on Consumer ODR provides for the establishment of an ODR Platform where B2C e-commerce disputes are solved by linking suppliers, consumers and ODR Practitioners.[86] According to article 5 of the regulation, the EU ODR Platform is a user-friendly website where one may lodge a dispute before an Alternative Dispute Resolution agency. Article 7 requires the UK to provide a contact point of the ODR Platform to assist with lodging of complaints.

Regulation of ODR in the United States

The legal framework of ODR in the United States (US) supports market regulation. In the US there are no express statutory provisions that regulate the operation of ODR in e-commerce disputes. However, it allows the use of arbitration in B2C disputes.[87] ODR systems in the US lack an elaborate

[83] Briggs, L. J. (2016). Civil Courts Structure Review: Final Report. Judiciary of England and Wales, 44
[84] Ibid
[85] Section 8 Regulation (EU) No 524/2013 of the Regulation on ODR.
European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC 2013 s 8.
[86] Regulation on Consumer ODR art. 1, 2
[87] The USA Federation Arbitration Act of the 1970

regulation as they developed without any specific provision of law and therefore should be left exclusively to the private sector.[88]

VI. Implementing Online Dispute Resolution in Kenya

Online trade is gaining momentum in Kenya. Take, for instance, the case with garment industry in Kenya where most firms are adopting electronic systems which support B2B e-commerce.[89] On its part, the banking industry is integrating online systems in mobile banking for B2B e-commerce in Kenya such as M-KESHO by the Equity Bank of Kenya.[90] Disputes arising in the course of such e-commerce transactions necessitate the use of Online Dispute Resolution (ODR) as it is suited for internet based disputes.

There have been progressive efforts towards the implementation of ODR in Kenya. For example the Kenya Network Information Centre (KeNIC) Alternative Domain Name Dispute Resolution Policy which recognizes online mediation and online arbitration for the resolution of Domain name disputes.[91]

Similarly, there is an ongoing discussion, which has been influenced by the approaches taken in other countries as documented in Part III above, on whether to recognize ODR in the legal framework. Proponents of ODR argue that it should be adopted into the legal framework owing to its use in B2C E-commerce disputes in Kenya.[92] On the flip side, there are suggestions to

[88] Esther van den Heuvel, 'Online Dispute Resolution as a Solution to Cross-Border E-Disputes' 21, 22

[89] Mary Njeri Kinyanjui and Dorothy McCormick, 'E-Commerce in the Garment Industry in Kenya: Usage, Obstacles and Policies' (London School of Economics and Political Science and Institute of Development Studies 2002) 24

[90] Jeremmy Odhiambo Okonjo, 'Convergence Between Mobile Telecommunications and Financial Services: Implications for Regulation of Mobile Telecommunications in Kenya' (LLM Thesis, University of Nairobi 2013) 19

[91] Section 7 (3) & 40 (2) of the KeNIC Alternative Domain Name Dispute Resolution Policy

[92] Wanja E Mugo, 'The Implementation of Online Dispute Resolution to Resolve E-Commerce Consumer Dispute in Kenya' (LLB Dissertation, University of Nairobi 2014)

amend the Arbitration Act to include online arbitration.[93] However, critics have contended that there is no need for its incorporation into the legal framework because ODR has not been fully appreciated in Kenya and, that an ODR regulation hampers innovation and growth of technology.[94]

The following consists of other ways of implementing ODR in Kenya;

1. Since ODR is largely dependent on Internet Connectivity, measures should be set up to ensure widespread use of ODR by installing affordable and efficient internet connection in Kenyan households to maximize the potential of B2C E-commerce and the disputes that arise thereof.
2. Enacting a legislation on ODR to promote E-Commerce and establishing bodies which will promote adherence to the legislation.
3. Including ODR into the education curriculum of various courses related with IT, Commerce and Law in the higher learning institutions.
4. Creating awareness on ODR and its procedures in dispute resolution.
5. Establishing ODR Platforms by various state agencies such as the Kenya Revenue Authority for tax disputes and the private sector.
6. Providing adequate education to neutrals (online mediators and arbitrators) on the use of ODR websites to ensure the application of ADR mechanisms online.

Conclusion

Businesses, consumers and the government in e-commerce transactions ought to promote Online Dispute Resolution through the state and non-state agencies. Businesses should encourage Consumers to use ODR as its providers embark on creating awareness on the method of dispute resolution in e-commerce and other internet websites. A stable legal framework on

[93] Isolina Kawira Kinyua, 'Online Arbitration: The Scope for Its Development in Kenya' (LLM Thesis, University of Nairobi 2012) 113

[94] Joe Harpaz, 'How Regulation Stifles Technological Innovation' (Daily Reckoning, 6 May 2014) available at: https://dailyregulation.com/how-regulation-stifles-innovation/ accessed 9th June, 2021

ODR will not only contribute to the development of e-commerce but also encourage consumer confidence in it.

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can-overwhelm-our courts&ved=2ahUKEwissrmEi8PuAhWJUBUIHU52DRQQFjAAegQIAxAC&usg=AOvVaw16tN4jXd4oo7KvHI3z8K9Y> Access date: 5th May 2022

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A Passive Observer or an Active Participant: Role of the Judicial Officer in the Criminal Trial in Kenya

By: ***Viola S. Wakuthii Muthoni****

Introduction

The Judge or Magistrate[1] is comparable to a referee in a football match. He or she[2] is the umpire, ensuring a level playing field, within the preserves of the law, for the competing parties. Active Case Management (hereinafter ACM) is the term used to refer to the Magistrate's role of conducting cases in a just and expeditious manner. This is referred to as the 'overriding objective'.[3] The goal of the overriding objective includes;

1. Acquitting the innocent and convicting the guilty,
2. Dealing with the prosecution and defence fairly,
3. Respecting the interests of witnesses, and
4. Dealing with the case expeditiously and efficiently.[4]

The main legal instrument that enjoins Judicial Officers to be proactive in the management of cases in their courtrooms is the Constitution of Kenya, 2010. Article 159 establishes judicial authority and sets out the principles to guide Judicial Officers as they exercise this authority. The principles include that, justice should be done to all, irrespective of their status; justice should

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[1] The Words 'Judge', 'Magistrate', Judicial Officer' and 'Court' have been used interchangeably.

[2] The terms 'he/she/him/her are used to connote persons of all genders. The terms have been used interchangeably, and where one appears, it includes the others.

[3] Guideline 1.1 of the Active Case Management Guidelines, available at *https://www.unodc.org/documents/easternafrica/Criminal%20Justice/Active_Case_Management_Guidelines_Kenya.pdf* (Accessed 17/2/2022). The Guidelines were gazetted in Gazette Notice 1340 of 2016 (ACM Guidelines)

[4] Andrew Hall (2010), Where do Advocates Stand When the Goalposts are Moved, International Journal of Evidence & Proof 14 E&P 109. This mirrors the provisions in Guideline 1.2 of the ACM Guidelines, Kenya.

be administered without undue delay; alternative modes of dispute resolution should be promoted; and justice should be administered without undue regard to procedural technicalities.

In criminal trials, ACM is guided by among others, the Judiciary Active Case Management Guidelines,[5] which were gazetted in exercise of the Chief Justice's power to make rules of procedure of courts.[6] The Guidelines were developed during the tenure of the Honourable Chief Justice Willy Mutunga, pursuant to the Judiciary Transformation Framework (JTF Framework);[7] which was a reform program to address, among others, delay and corruption in the Judiciary.[8] The JTF was structured around four goals, one of which was, (to achieve) a people-centred delivery of justice; through access to justice, simplification of court procedures and creation of a case management system.[9]

The foundations laid by the JTF were built upon by the succeeding Chief Justice David Maraga, who launched his strategic blueprint, based on 6 pillars, dubbed Sustaining Judiciary Transformation: A New Service Delivery Agenda (SJT). One of these pillars was registry and case management, calendaring and citizen-centric communications; all aimed at enhancing delivery of justice.[10] Chief Justice Martha Koome, has also unveiled her vision for the Judiciary, dubbed Social Transformation through Access to Justice (STAJ), comprising of 8 principles, including accessibility and efficiency.[11] Active case management is a key component of these blueprints.

[5] The Active Case Management Guidelines do not take precedence over specific rules that that govern ACM. See Para 2 Page 4 of the ACM Guidelines.
[6] Section 10 Judicature Act, Cap 8 Laws of Kenya.
[7] 2012-2016, launched in May 2012.
[8] Maya Gainer, Transforming the Courts: Judicial Sector Reforms in Kenya 2011-2015, Innovations for Successful Societies, Princeton University, http://successfulsocieties.princeton.edu/ (Accessed 14/3/2022).
[9] Maya Gainer (2015) page 8.
[10] The SJT ran from 2016-2021. Judiciary of Kenya website, Available at https://www.judiciary.go.ke/highlight-of-the-chief-justice-blueprints/ (Accessed 15/3/2022).
[11] Kenya Judiciary website supra.

Background

The Kenyan criminal justice system draws from the English criminal justice system, and is adversarial. Ed Johnson[12] traces the role of a Judge in the English criminal justice system from the 'accused speaks' system,[13] where a lawyer- free trial was held; through the development of the adversarial trial[14] to the modern system, which focuses on active case management.[15] He explains the changing roles of the judge through the transitions, stating that initially the judge took an active role, examining and cross-examining witnesses; later he took a passive role, required of an adversarial system, and that currently, he takes a managerial role.[16] Further that the changing role of judges has caused difficulties in ascertaining boundaries of what is the acceptable and unacceptable intervention.[17] He further states that the managerial role poses a great threat to adversarialism and fundamental fair trial rights.[18]

David Neubauer[19] states that the traditional role of a passive judge is changing, and the view that the Court has no interest in moving the case along because it belongs to lawyers is no longer acceptable. The question however is the acceptable degree of management.[20] Perez and Javier state that, it is necessary to manage (the cases) without breaching the guarantees

[12] Ed Johnson, All rise for the Interventionist: The Judiciary in the 21st Century, Journal of Criminal Law (2016) Vol. 80 (3) 201-213
[13] Ed Johnson (2016) 202.
[14] Ed Johnson (2016) 203.
[15].Ed Johnson (2016) 208.
[16] Ed Johnson, (2016) 212.
[17] Ed Johnson (2016) 212.
[18] Ed Johnson, The Role of the Defense Lawyer: Conceptions and Perceptions Within a Changing System, (2021) Lexington Books, Rowman & Littlefield Publishing Group, Inc. 4.
[19] David Neubauer, Judicial Role and Case Management, The Justice System Journal, Vol. 4 No. 2 (1978) 223-232.
[20] David Neubauer (1978) 223.

of fair trial.[21] According to Jenny McEwan,[22] Judges take a new role in active case management which represents a redefinition of the judicial role from neutral umpire to interventionist.[23] Andrew Hall[24] argues that this role is a sacrifice of the presumption of innocence, in the interests of perceived efficiency. Hughes and Bryden[25] explore the possible boundaries between permissible and impermissible interventions by Judges, as does Freya Kristjanson[26] This paper explores the role of the Judicial Officer and the acceptable degree of 'active intervention' by Judicial Officers at each stage of criminal trial in Kenya.

Pre-trial stage

The function of a Judicial Officer in a criminal trial begins at the plea-taking stage, except where the accused is presented to court for an application for continued detention. Applications for continued detention are based on Article 49(1) (a) and (f) of the Constitution of Kenya, which provides for the rights of an arrested person to be informed of the reason for his arrest, and to be brought before court within 24 hours of arrest. Section 36A of the Criminal Procedure Code provides their procedural modalities. [27] The Judicial Officer, in determining such applications must balance the rights the arrested person, public interest, public order and security.[28]

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[21] Pérez-Ragone, Alvaro Javier, An Approach to Case Management from the Horizontal and Vertical Structure of Court Systems (2018). ZZPInt 23 (2018), Available at SSRN: https://ssrn.com/abstract=3422441 (Accessed 18/3/22).

[22] Jenny McEwan, Changing Face of Criminal Litigation in England and Wales, Exeter University 14-15 International Journal of Evidence and Proof (2010) 89-95.

[23] Jenny McEwan (2010) 90.

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[25] Jula Hughes & Phillip Bryden, Implications of Case Management and Active Adjudication for Judicial Disqualification, Alberta Law Review Vol 54, No. 4 (2017) page 859 (Hughes & Bryden).

[26] Freya Kristjanson & Naipaul Sharon, Active Adjudication or Entering the Arena: How Much is Too Much. 2011 Canadian Journal of Administrative Law and Practice; Toronto Vol. 24 Iss. 2 June (2011).

[27] Cap 75 Laws of Kenya. The period of such detention should not be more than 30 days per Section 36A(7).

[28] See the Holding by Justice Professor Joel Ngugi in Nakuru Criminal Revision No. 208 of 2020 Sudi Oscar Kipchumba Vs Republic (Through National Cohesion and Integration Commission) (2020) eKLR.

When the accused is presented before the Judicial Officer, the Judicial Officer must correctly take down the proceedings; ensure that the charges and particulars are stated correctly to the accused person, in a language the accused understands. The Court must record the language used, and the accused's answer to the plea in as close as possible to the words the accused uses. This procedure is provided in Section 207 of the Criminal Procedure Code and was set out in the case of *Adan Vs Republic***.**[29] The Judicial Officer must ensure that the rights of the accused are safeguarded, which includes listening and resolving any complaints or concerns that the accused might have, to the extent of the Judicial Officer's jurisdiction.[30]

The practice of some courts has been to take a passive role during plea-taking, only recording the proceedings, without making any interventions. Other courts are more active, making observations and addressing issues, whether raised by the parties or not. One of the issues that the Court can inquire into at this stage is the age and or mental status of the accused, whether it is disclosed by the parties or not. Following the inquiry, if the accused is found to be a child or a person with mental disabilities; the course of trial changes and the Court is able to enforce the legal provisions guaranteed for children in conflict with the law or persons with mental

[29] **[1973] EA 445**, the Court of Appeal laid down the procedure of taking pleas, to be as follows:
(i) the charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language he understands;
(ii) the accused's own words should be recorded and if they are an admission, a plea of guilty should be recorded;
(iii) the prosecution should then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts;
(iv) if the accused does not agree with the facts or raises any question of his guilt his reply must be recorded and change of plea entered;
(v) if there is no change of plea a conviction should be recorded and a statement of the facts relevant to sentence together with the accused's reply should be recorded.

[30] Applications for redress for violations of an arrested person's rights are determined by the High Court, as provided in Article 23 of the constitution.

disabilities as the case may be.[31] In *James Muriuki Vs R,*[32] the High Court sitting in revision quashed a conviction meted on an accused person and stated as follows:

> "*The trial magistrate should have had the accused assessed as to the mental capacity and age. Full investigation ought to be done before trial or after conviction to give a balanced decision."*

During the first arraignment of the accused in Court, the Judicial Officer also sets bail or bond terms, unless the Prosecution presents compelling reasons why the accused should not be released on bail or bond pending trial. Compelling reasons for denial of bond have been set out in the Judiciary Bail and Bond Policy Guidelines to include:

1. Nature of charge and seriousness of the likely punishment,
2. Strength of the prosecution case,
3. Character and antecedents of the accused,
4. Accused's failure to observe bail or bond terms on previous occasion,
5. Likelihood of interfering with witnesses,
6. Need to protect victims of the crime,
7. Relationship between the accused and potential witnesses,
8. Child offenders,
9. Where the accused is a flight risk,
10. Whether the accused is in gainful employment,
11. The need to maintain public order, peace or security, and
12. Protection of the accused.[33]

[31] In Weldon Kiprono Ngeno Vs R Kericho Criminal Revision no. 181 of 2012, The High Court quashed the conviction and sentence of the trial Magistrate who had sentenced the accused to 7 years imprisonment. The accused was a minor of 17 years. The High Court stated that the trial magistrate should have made an informed decision regarding the age of the accused.

[32] James Muriuki Vs R (1993) eKLR

[33] Judiciary Bail and bond Policy Guidelines. Available at http://kenyalaw.org/kl/fileadmin/pdfdownloads/Bail_and_Bond_Policy_Guidelines.pdf (Accessed 22/2/2022).

The Judicial Officer must fix the matter for mention for pre-trial conference, within 14 days of a entering a plea of guilty against an accused person.[34] There is a requirement that cases involving accused persons in custody must be mentioned every fortnight, which is a safeguard for the accused, who are unable to raise the bond terms. During these mentions, the accused is able to apply for bond review and make any complaints or requests to the Court. The Court is also able to see the accused and ensure he is of good health as well as address his or her concerns. Conducting a pre-trial conference is mandatory; a Judicial Officer who does not conduct one must record the reasons for not doing so.[35]

Pre-trial conference is also important as it ensures that the parties are prepared for trial, thus minimising adjournments. During the pre-trial conference, the Judicial Officer ensures that the following has happened,

1. The accused and the court[36] have been supplied with the evidence that the prosecution intends to rely on;
2. Disputed issues are identified;
3. Issues of admissibility of evidence are determined, as well as need for facilitation for instance for interpreters and technical support such as need for video links to enable witnesses to testify;
4. The number and needs witnesses to be called during trial are identified, including vulnerable witnesses;
5. The length of trial is determined;
6. The timetable for progress and conclusion of the case is set;
7. The question is answered whether the case is suitable for Alternative Dispute Resolution or Plea Bargain;
8. Parties are encouraged to cooperate to ensure the case is concluded expeditiously;
9. Other relevant issues prior to the trial are discussed and resolved.

[34] Guideline 5.1 of the ACM Guidelines.
[35] Guideline 5.2 of the ACM Guidelines.
[36] The practice has been that statements and documentary exhibits are usually only supplied to the accused or his counsel except in murder trials. The ACM Guidelines recognise however, that such evidence should also be supplied to the court. See Guideline 3.1(a).

The guidelines provide not only for disclosure, but also for the conduct of the entire case. They also maintain the autonomy of the Court to conduct those proceedings how it deems fit, while observing the overriding objectives. In *Director of Public Prosecutions Vs Peter Aguko Abok & 35 Others (2020) eKLR,*[37] the High Court, noted that:

> "*The only relevant document addressing the issue of disclosure is the Judiciary Guidelines for active case management of criminal cases in Magistrates and High Courts of Kenya… A court of law is not a mechanical machine to operate within strict and fixed parameters. Each court has a case management strategy executed within the confines of the law to ensure optimal results and attainment of the overriding objective that criminal cases be dealt with justly and expeditiously...*"

The importance of the pre-trial conference cannot be overstated; hence, the Judicial Officer must always interrogate the issues above and satisfy him or herself that the issues are addressed effectively and conclusively before setting the trial dates. The ACM Guidelines do not contain timelines within which particular events should occur during trial, hence it is the role of the Judicial Officer to conceive a timetable for expeditious disposal of the case.[38] The court has power to give any directions for effective proceeding of the case, whether on its own motion, or on application by parties.[39] In the *DPP Vs Peter Aguko Abok*[40], the court found that, *"A trial court can suo moto give directions to ensure efficient and smooth running of court business… I would regard (them) as powers which are inherent in its jurisdiction."*

Judges take on new responsibilities in ACM in criminal trials; including setting a timetable for the trial, asking parties to cooperate and exchange

[37] Nairobi Criminal Revision Application No. 42 of 2019 from the Ruling of Hon. D. Ogoti (CM).
[38] This was held in R Vs Omar Mwinyi Musimba (2017) eKLR as quoted in Director of Public Prosecutions Vs Chief Magistrates Court Milimani Anti Corruption and Kioko Mike Sonko Mbuvi & 18 Others Nairobi Revision Application No 8 of 2020.
[39] Guideline 6.3 ACM Guidelines.
[40] Ibid note 17. Paragraph 60 & 61 of the Ruling by Justice JN Onyiego.

information, identifying key issues and agreeing on non-contentious issues.[41] In promoting the overriding objective, the Judge or Magistrate must deal with a case justly, which constitutes; taking into account the gravity of the offence, complexity of the subject, severity of consequences for the accused and others and the needs of other cases.[42]

In giving pre-trial directions however, the Judicial Officer must be careful, not to overstep his or her jurisdiction. In *Director of Public Prosecutions Vs Chief Magistrate's Court Milimani Anti-Corruption and Kioko Mike Sonko Mbuvi*,[43] the anti-corruption court had issued directions on its own motion that;

> *"Henceforth, the relevant agencies to ensure that at the time of filing of the charge (s) in the anti-corruption Court, they simultaneously file a copy of a duly executed inventory… It is upon the satisfaction of the above requirement that the plea will be accepted for registration and only then will a matter be fixed for hearing."*

The High Court Justice sitting on Revision acknowledged that the decision was well-intended, as it sought to ensure full disclosure by the prosecution and in effect expediting cases. The Court however found that the directions were irregular as they were in effect orders *in rem* and outside the jurisdiction of the Court.

In addition, the Judicial Officer should not be seen to sacrifice the fair trial safeguards of the accused at the altar of expeditiousness. It has been argued that the requirement for the accused to cooperate, identify issues and exchange information with the state is inconsistent with the accused's right to remain silent and flies in the face of legal professional privilege, where the accused is represented.[44] It is worth noting here that the ACM guidelines do not place a burden on the accused to disclose his documents. Such a

[41] Jenny McEwan, Changing Face of Criminal Litigation in England and Wales, Exeter University 14-15, 2010, page 90 (Jenny McEwan 2010).
[42] Jenny McEwan, 2010, page 91.
[43] Nairobi Revision Application Number 8 of 2020.
[44] Andrew Hall (2010) page 115.

requirement is only on the state.[45] This is except in the case of alibi, where the state is allowed to rebut the evidence.[46]

Therefore, the Judicial Officer must always promote 'equality of arms' by promoting the constitutional safeguards of an accused, pitted against a powerful and well-resourced state.[47] The ACM guidelines should be only be applied subject to the legal and constitutional provisions that protect the rights of the accused to fair trial, which form the basis for the adversarial system of criminal trial. At the pre-trial stage, the Judicial Officer is indeed the 'driver' of the process, ensuring that the case is ripe for trial.

During the Hearing

When the case comes up for hearing, on top of the Judicial Officer's obvious role of taking complete and accurate proceedings, he or she plays the role of ensuring that the parties do not delay the hearing. The Judicial Officer must only grant adjournments as a last resort, only when good reasons have been given.[48] The Judicial Officer must treat the parties fairly, uphold impartiality and protect the rights of the accused and those of the victim (if any).

The Judicial Officer must accord each party adequate time to present their case; to examine and re-examine their witness and to cross-examine opponents. He or she must also ensure adherence of parties with the Evidence Act as to examination of witnesses and admissibility of evidence.[49] It has been noted that a Judge (or Magistrate) is not required to sit silent as

[45] Article 50(2)(j) of the Constitution of Kenya. In Thomas Patrick Gilbert Cholmondeley Vs R (2008) eKLR, it was held that the duty to supply evidence is not reciprocal.

[46] Section 212 Criminal Procedure Code.

[47] The right to fair hearing is non-derogable and cannot be limited as per Article 25 (c) of the Constitution.

[48] Guideline 5.5 ACM Guidelines provides that adjournments should only be granted in exceptional circumstances.

[49] The Judicial Officer also superintends and determines objections where Sections 145,146, 150 and 151 of the Evidence Act, Cap 80 Laws of Kenya, have been offended.

the sphinx while the trial rolls on.[50] He or she is not only entitled, but also required to make appropriate intervention by posing relevant questions to a witness when the witness is giving evidence; especially when the evidence is technical.[51] The questions that the Judge or can ask should be geared to:

1. Clear up a point which is overlooked or left obscure;
2. Ensure that advocates behave themselves properly;
3. Keep to the rules laid down by law;
4. Exclude irrelevancies and repetition;
5. Follow the points being made by advocates and assess their worth so that he is able to make up his mind on where the truth lies.[52]
6. Dispense with proof of obvious or agreed matters;
7. Ensure that the way a witness is answering or not answering questions does not hamper the progress of trial.[53]

Where the Court is faced with unrepresented accused persons, it is also the role of the Judicial Officer to guide them through the trial process. The guidance should be kept to a minimum level to ensure fair trial, so as not to assist the unrepresented party to the disadvantage of the represented party. The assistance should not amount to advice that a counsel would otherwise give.[54] There is a thin line between facilitating the participation of an unrepresented accused and advocacy.[55] The Judicial Officer must stick to facilitating the participation of the accused and not take the role of examining or cross-examining witnesses, as this could give rise to apprehension of bias.

[50] Mackenzie Thomson, Traditional Approach of the Judiciary in Adversarial Proceedings. Available at http://www.cba.org/CBA/cle/PDF/JUST13_Paper_MackenzieThompson.pdf (Accessed 1/3/2022).
[51] Mackenzie Thomson ibid.
[52] Jones Vs National Coal Board (1957) QB 65 (Jones 1957). Hughes & Bryden hold a contrary opinion, that the Judicial Officer should not seek to test the validity of evidence by posing questions to a witness as this may give rise to apprehension of bias. Hughes & Bryden (2017) 859.
[53] Canadian case of Chippewas of Mnjikaning First Nation Vs Ontario (Minister of Native affairs) 2010 O.J No. 212 para 223 (Chippewas 2010).
[54] Canadian case of Barret Vs Layton (2004) Can LII 32185.
[55] Michell Flaherty, Self Represented Litigants, Active Adjudication and the Perception of Bias; Issues in Administrative Law (2015) 38: 1 Dal LJ 119.

A criminal trial is an adversarial process and not an investigation by the trial Court, hence the court should not usurp the role of counsel to make out their cases.[56]

The Judicial Officer must not compensate for real or perceived failings of counsel, as this would amount to 'descending into the arena of dispute' and adopting an inquisitorial mode of hearing.[57]As stated by Lord Denning in *Jones Vs National Coal Board*:

> "*If a judge should himself conduct the examination of witnesses, he so to speak, descends into the arena and is liable to have his vision clouded by the dust of conflict".*[58]

The interventions should be kept at a minimum and should apply to equally to both parties.[59] It is also desirable that the Court should reserve its questions for when counsel have finished their questions.[60]

The Judicial Officer may make interventions, but they should be limited, more so during cross-examination. This is because, excessive intervention during cross-examination allows the witness time to think through answers to difficult questions, which may go contrary to the strategy of the defence counsel. It also disrupts the counsel's train of thought.[61] It therefore affects fairness of the trial and may lead to apprehension of bias by the parties.[62] Improper interventions by a trial Judicial Officer may lead to quashing of convictions, examples of which are:

1. Questioning an accused in a way that gives the impression that the Court is siding with any of the parties;
2. Unnecessary interventions;

[56] R Vs Valley (1986) CCC (3d) 207
[57] Hughes & Bryden page 863.
[58] (1953) J No. 136 2QB
[59] Hughes & Bryden, page 857.
[60] Freya Kristjanson & Sharon (2011) page 17.
[61] Jones (1957) p. 65.
[62] Freya Kristjanson & Sharon (2011) 21.

3. Interventions that preclude the accused from telling his or her story in his or her own way;
4. Numerous sarcastic comments;
5. Questions to unearth additional evidence than that which has been presented;[63]
6. One-sided interventions, cutting-off questions, speculation to fill in gaps in evidence.[64]

The Court can also intervene to prohibit indecent and scandalous questions[65] or insulting questions.[66] Such prohibition is done to protect the privacy of the victim, and must be done with regard to the right of the accused to fully cross-examine the witness.[67] In the Canadian case of *R. Vs Schmaltz*,[68] the Court of Appeal found that intervention of a judge in a sexual assault case infringed on the accused's right to make full answer and defence. The trial judge had intervened where the witness was asked if she had flirted with the accused.[69] Therefore, while the Judicial Officer must ensure respect and decorum is upheld during proceedings, he/she should only make intervention when it is necessary, as when protecting a complainant from overly aggressive or irrelevant cross-examination.[70]

It has been argued that ACM redefines the role of the Judge or Judicial Officer from that of a neutral umpire to either interventionist participant or administrative bureaucrat, or both.[71] It has also been argued that some of the principles underpinning ACM, especially the emphasis on pre-trial processes raise the possibility of a shift from an adversarial to an inquisitorial mode of

[63] Canadian case of R Vs Stucky (2009) OJ No. 600. According to the Judge, the court may put questions to bring out a relevant matter which was omitted, but in so-doing, the Judge should be careful not to leave his or her position of neutrality to become the cross-examiner.
[64] Hughes & Bryden page 865.
[65] Section 159 Evidence Act.
[66] Section 160 Evidence Act.
[67] Hughes & Bryden page 862.
[68] (2015) ABCA CCC 3d 159.
[69] Hughes & Bryden, page 852.
[70] Hughes & Bryden, page 862.
[71] Jenny McEwan, 2010, page 90.

inquiry. [72] Further, that the developments in case management will substantially dilute the quality of the criminal justice system, and hack at its adversarial foundations.[73]

The foundations of an adversarial trial lie in the fact that a criminal prosecution is a coercive process undertaken by the state against an individual. [74] The situation inevitably pits one extremely powerful, authoritative and resourced party against another, not so powerful and less resourced accused person.[75] This underpinned the 'equality of arms' doctrine that gave rise to the protections afforded to accused persons faced with criminal trials. The protections that ensued are entrenched in our Kenyan Constitution and other National and International Laws. They include:

1. Provision of legal representation at the state's expense,
2. A high standard and burden of proof by the state,
3. Right to silence,
4. Prohibition against hearsay evidence,
5. Non-admission of bad-character evidence,
6. Prohibition of self-incrimination,
7. Judicial discretion to quash charges, dismiss them or acquit an accused person for want of evidence, and
8. The requirement for the prosecution, not the defence, to disclose their case in detail at the beginning of the trial, except where the accused presents alibi as his defence.[76]

Ruling on Case to Answer

At the close of the prosecution case, the Judicial Officer invites parties to make submissions, and proceeds to write the Ruling on case to answer. This

[72] Jenny McEwan, 2010, page 90. Also See, Andrew Hall, Where do Advocates Stand When the Goalposts are Moved, International Journal of Evidence & Proof (2010) 14 E&P 107.
[73] Jenny McEwan, 2010 page 94.
[74] Andrew Hall, 2010 page 109.
[75] Andrew Hall, 2010, page 110.
[76] Andrew Hall, 2010, page 111

is also referred to as a Ruling on a *prima facie case.* In *Ramanlal Bhatt Vs R*[77] a *prima facie* case was defined as:

> *"…one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence."*

When making this Ruling, the Court does not need to give its reasoning, and it does not to determine with finality the weight of the evidence; unless it is acquitting the accused.[78] The Court only states that it has found that the accused has a case to answer.

If no case has been made out against the accused, the Judicial Officer should acquit the accused.[79] The Judicial officer should not place the accused on his defence just to clarify doubts in the prosecution case or to fill any evidentiary gaps.[80] The onus of proving all the ingredients lies on the prosecution, and it is only when the burden has sufficiently been discharged that the accused is found to have a 'case to answer'.

Defence case

Where the Judicial Officer places the accused on his defence, he or she explains Section 211 of the Criminal Procedure Code, where the accused should elect his mode of defence.[81] The Judicial Officer then records the mode of defence and proceeds to fix the case for defence hearing. The Judicial officer should afford the accused adequate time and resources to prepare for his defence, while at the same time upholding the principle of expeditiousness. The Judicial Officer should not give the accused leeway to unnecessarily delay conclusion of the case.

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[77] 1957 (EA)332.
[78] Anthony Njue Njeru Vs R. Criminal App. No. 77 of 2006 (2006) eKLR.
[79] Section 210 Criminal Procedure Co.de Cap 75 Laws of Kenya.
[80] Justice Odunga in R Vs Robert Zippor Nzilu (2020) eKLR whicle quoting the Malayan case of Public Prosecution Vs Zainal Abidin B. Maidin & Another Criminal Appeal No. 41LB-202-08/2013.
[81] These include giving Sworn Evidence with or without witnesses, giving unsworn evidence with or without witnesses and choosing to remain silent.

In *Manchester Outfitters Limited Vs Pravin Galot & 4 Others (2020)eKLR* the Court noted that sometimes parties fail to carry out their duty to assist the court to deliver justice without delay. Instead, they "…*take advantage of the court procedures and processes to delay determination of disputes…"* The matter involved numerous cases, both civil and criminal, involving similar parties, and which had complicated the trial issues. The Court of appeal exercised its power to manage the cases, listed all the applications for hearing, heard them back-to-back and rendered a consolidated Ruling determining 10 applications. In rendering the ruling, the Court emphasised that:

> "*It is the combined responsibility of the parties, their advocates and the courts to ensure disputes are resolved in a more efficient and cost-effective manner… Counsel, particularly being officers of the court, must never be seen to deliberately prolong the cases they have the conduct of indefinitely, by resorting to delaying tricks and tactics."*

When hearing the defence case, the same principle of limited intervention discussed above should be applied. The Judicial Officer should not appear to have adopted a position on the facts, issues or credibility of the accused or his witnesses.[82] The test of this is not whether the accused was in fact prejudiced by the intervention by the Judge, but that a reasonably minded person, sitting throughout the trial would consider that the accused had not had a fair trial. The appearance of fairness is crucial, especially when the accused takes the stand.[83]

Judgment

Once the accused person presents his or her case and closes the defence case, the Judicial Officer then invites the parties to make submissions and reserves a date for Judgment. Although there is no stipulated period within which the

[82] In the Canadian Case of R Vs Stucky, (2009) O.J No. 600 (CA), a decision was challenged because the judge had cross-examined the accused and some of his witnesses in a dismissive manner. The decision was overturned as it gave rise to an apprehension that the Judge had pre-judged the credibility of the accused.
[83] Canadian Case of R Vs Valley (1986) CCC (3d).

Judicial Officer should write the judgment in criminal cases, he or she should unreasonably delay it. Once the judgment is ready, the Judicial Officer reads it out to the parties in open court, and signs it.

The Judgment should contain a summary of the evidence presented by the parties, the law applicable, the finding of the court and the reasons for the finding.[84] The Judicial Officer may use relevant cases to explain legal principles. After pronouncing the Judgment, the Judicial Officer should remind the parties of their right to appeal, within 14 days. The Court should also make orders on application of the parties regarding typing of proceedings, leave to appeal, refund of cash bail, disposal or dealing with exhibits etc. The outcome of criminal cases is either conviction or acquittal of the accused and the Judgment should state as such.[85]

Sentencing

Where the Judicial Officer convicts the accused, he or she and invites the Prosecution to state whether the accused is a first or a repeat offender. The Court also takes mitigation from the accused, and proceeds to sentence him or her. At this stage, the Court may hold a sentencing hearing,[86] where the Prosecution may present a Victim Impact Statement[87] on the impact of the crime. In issuing the sentence, the Court considers the penalty as provided for by law-both statute and case law,[88] as well at mitigating and aggravating factors.[89]

[84] Section 169 of the Criminal Procedure Code Cap 75 Laws of Kenya provides that the judgment shall contain the section under which the accused was charged, that the accused is convicted (or acquitted) as well as the sentence. If acquitted, the judgment should state that the accused be set at liberty.
[85] Section 215 of the Criminal Procedure Code Cap 75 Laws of Kenya.
[86] Section 216 Criminal Procedure Code.
[87] Provided for in Section 12 of the Victim's Protection Act No. 17 of 2014 and Section 329C of the Criminal Procedure Code.
[88] Case law clarifies otherwise problematic terms, such as 'is liable' to which has been held to mean the maximum sentence. This was held in R Vs Sarah Mutete Matheka (2018) eKLR, quoting the Ugandan case of Opoya Vs Ug (1967) EA 752.
[89] See the Judiciary Sentencing Guidelines (Available at http://kenyalaw.org/kl/fileadmin/pdfdownloads/Sentencing_Policy_Guidelines_Booklet.pdf - accessed 21/2/2022) Pages 49-51.

The Court may, on its own initiative, call for a Pre-Sentence Report[90] from the Probation and Aftercare Services, which enables the Court determine whether the accused is suitable for a non-custodial sentence. The factors to be considered in making this decision include;

1. Gravity of the offence;
2. Accused's previous records
3. Where the accused is a child in conflict with the law
4. Character of the accused
5. Protection of the Community and
6. Accused's responsibilities to third parties.[91]

A Judicial Officer can issue the following sentences; imprisonment, probation order, community service order, fine or compensation.[92] Where he or she has convicted the accused of more than one count, the Judicial Officer determines whether the sentences will run concurrently or consecutively. He or she must also take into account the period the accused person has stayed in remand during the pendency of the trial.[93] Where the law provides for a minimum sentence, the Judicial Officer cannot give a lower sentence and cannot substitute the sentence with a fine.[94]

Conclusion

It might seem that the safest course for a Judicial Officer is to avoid any intervention during trial, hence avoiding complaints about impartiality. This paper argues that this is not a viable strategy,[95] given that evolution of the role of the Judge in light of the ACM guidelines. Indeed, the Judge or Magistrate must manage his or her Court, according the appropriate time to cases according to their needs. The Judge or Magistrate must therefore make the relevant interventions, especially during the pre-trial stage. The

[90] Rule 4(1)(a) Probation of Offenders Rules under Probation of Offenders Act Cap 64 Laws of Kenya.
[91] See Guideline 7.19 of the Sentencing Guidelines.
[92] Chapter VI of the Penal Code Cap 63 Laws of Kenya.
[93] Section 333(2) of the Penal Code.
[94] Section 26 (3) (i) Penal Code.
[95] Bryden & Hughes page 868.

interventions must be limited during examination-in-chief and cross-examination of witnesses, both for the prosecution and defense. The Judge must safeguard the rights of the accused, more so the unrepresented ones. He or she must jealously protect and guard the Constitutional protections and fair hearing rights of the accused.[96] The Judicial Officer, in promoting shorter trials, must enhance participation of self-represented litigants and compensate for vulnerabilities of third parties,[97] including victims of crime. The Judicial Officer is anything but a passive observer in the management of cases. It is no longer possible for the Judicial Officer to sit passively in 'monk-like silence as Counsel call the case in whatever fashion they please'.[98] He or she must take charge of his or her court, discharge the expected mandate, and reach the determined individual targets set by his or her employer. The Judicial Officer therefore has no choice but to be an active manager in the disposal of cases, at all stages of the trial, from pre-trial to sentencing.

Further to this, the Court should endeavour to maintain a calm demeanour and avoid expressions of annoyance, impatience and sarcasm.[99] This is in appreciation of the fact that some parties' conduct causes the Court to be frustrated, especially when such conduct undermines the overriding objectives of ACM; but the Court should not display such frustration in a way that leaves the impression that it has pre-determined an important aspect of the case.[100] The Judicial Officer should be open to persuasion throughout the trial and maintain neutrality so as not to give rise to apprehension of bias.[101]

[96] Provided in Article 50 of the Constitution of Kenya on fair hearing.
[97]Bryden & Hughes page 869.
[98] Quoted in the Canadian case of R Vs Federhof (2003) 68 OR 3d 481 at paragraph 40. Also in Quoroa Vs
Canada (Minister of Citizenship and Immigration) 2005 FC 271.
[99] Chippewas 2010 para 240.
[100] Bryden & Hughes page 866.
[101] Bryden & Hughes page 857.

The Judicial Officer is also guided by the Bangalore Principles of Judicial Conduct, [102] which are; independence, [103] impartiality, [104] integrity, [105] propriety, [106] equality, [107] competence and diligence. [108] The fact that our judicial system is adversarial makes it a delicate balance for the Judicial Officer; to be impartial and to expedite cases, while treating all parties fairly. This balance is achievable, and the ultimate result will be reduction of backlog and increased confidence of the public in the institution of the Judiciary, which is a pillar in promoting democracy.

…

[102] The Bangalore Draft Code of Judicial Conduct 2001 adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, November 25-26, 2002). Available at https://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf (Accessed 17/2/2022).

[103] Meaning to exercise judicial functions without regard for extraneous influences, but based on the Judicial Officer's assessment of the law and facts.

[104] Meaning that the Judicial Officer must conduct herself and issue decisions without favour, bias or prejudice. The process of issuing decisions, as well as the decisions themselves should show that the Judicial Officer does not lean on one side.

[105] Meaning that the Judicial Officer's conduct must be above reproach to a reasonable observer. The Judicial Officers must, in all their duties, maintain both their personal integrity as well as protect the image of the Judiciary.

[106] Meaning the conduct of a Judicial Officer must befit the stature of the office, which he/she holds. To this end, the Judicial Officer accepts personal restrictions otherwise not imposed on other people so as to protect their own image and that of the Judiciary. Includes managing their financial obligations and that of their family to avoid embarrassment, avoiding perception of bias, avoiding conflict of interest, not disclosing confidential information, avoiding favors and gifts by virtue of his or her office and those calculated to influence his or her decision.

[107] Meaning that the Judicial Officer treats all persons equally, avoids bias and discriminating on any of the parties that appear before him/her. In addition to practicing equality, the Judicial Officer must also require parties before her to avoid discriminating on any other party.

[108] Meaning that the Judicial Officer must give priority to the performance of his or her duties, and must take steps to keep abreast of developments in the law (including international law) that enable him or her to make timely and proper decisions. It also includes delivering the decisions promptly and maintaining order and decorum in the courtroom.

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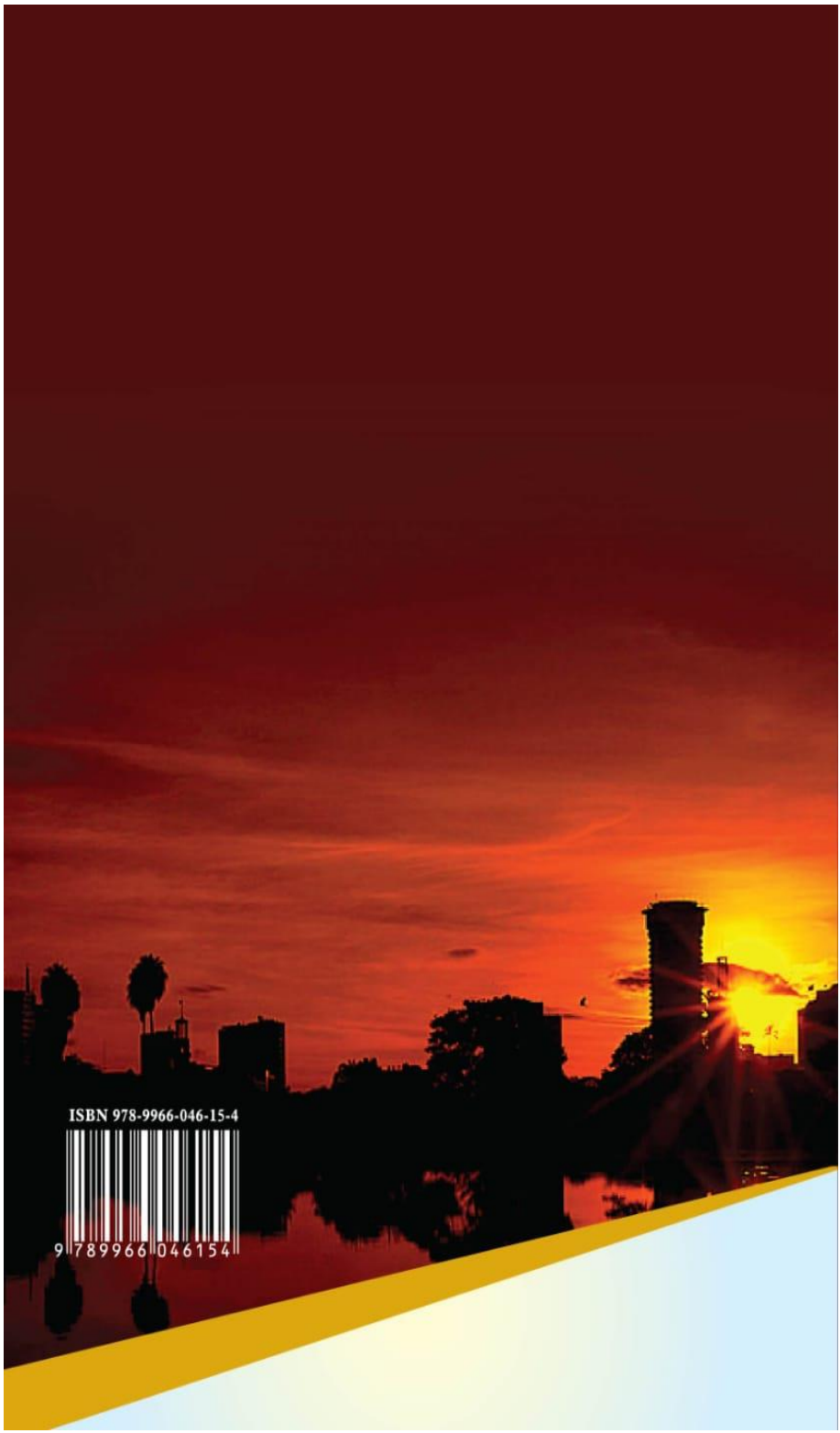

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